The Ciudades Modelo Project: Testing the Legality of Paul Romer’s Charter Cities Concept by Analyzing the Constitutionality of the Honduran Zones for Employment and Economic Development

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INTRODUCTION

The tremendous surge in unaccompanied, Central American minors making the perilous journey to the United States has prompted renewed attention to the living conditions fueling the migration.¹ Honduras, for example, has recorded the highest homicide rate in the world, causing many families to live under the constant threat of violence.² The fact that so many choose to travel over a thousand miles through hostile conditions to reach a nation that tries to turn them back adequately demonstrates the pressing demand that exists the rule of law in Central America. In a much better world, of course, these children would not need to migrate to the U.S; they and their families could live in peace and develop their capabilities in their own countries if they chose.

Over the last several years, the Honduran government has been aggressively developing a project that it believes will provide its citizens the ability to do just that. By establishing special autonomous “ciudades modelo” (“model cities”), it seeks to provide Hondurans with alternative jurisdictions in which they can find safety and opportunities. Hondurans would then freely “vote with their feet” for the most effective governments, while the governments, in turn, would compete for Hondurans by ensuring the rule of law without influence from the endemically corrupt, entrenched institutions in the rest of the country. The project, now formally called “Zones for Employment and Economic Development” (“ZEDEs”), received approval from the Honduran Supreme Court earlier this year and is currently undergoing feasibility studies.

The ZEDEs evolved from a concept originally introduced by economist Paul Romer, who proposed an idea he called “charter cities.” Charter cities would be the government equivalent

¹ See, e.g., Scarlett Aldebot-Green, Argument, America’s Young Refugees, FOREIGN POLICY MAGAZINE (July 8, 2014).
² Id. (citing the 2013 U.N Office on Drugs and Crime finding that 90.4 out of every 100,000 Hondurans are victims of homicide every year).
to a startup business—new autonomous, city-sized territories in which public policy ideas could be tested and, if successful, replicated throughout the countries and regions encompassing them. Charter cities would have their own governments, laws, and courts and operate with limited interference from the national government or its political processes. Ideally, the cities would help accelerate the development, spread, and implementation of positive policy reforms by demonstrating whether the policies work.

In 2010, top government officials in Honduras embraced Romer’s concept and proposed amending the Honduran Constitution and drafting legislation establishing model cities called Special Development Regions (“REDs”). The amendments and legislation passed in 2011 with nearly unanimous support from a post-coup Honduran Congress.

Over the next year, the relationship between Romer and the Honduran government became strained—seemingly because the Honduran government disagreed with Romer that the cities would need the assistance and supervision of developed-nation partners and because the Honduran government agreed to let a private development company begin work without communicating with the RED’s initial governing body. Romer backed out of the project in October 2012. Two weeks later, the Honduran Supreme Court declared the REDs unconstitutional.

Despite the Supreme Court’s invalidation of the RED Amendment and Statute, the Honduran President and Congress continued to vigorously promote the idea of special autonomous model cities to stimulate development. After removing and replacing four of the Supreme Court justices who struck down the REDs, Congress drafted a new constitutional amendment and statute creating ZEDEs.

The government of the ZEDEs would consist of a 21-member Committee for the Implementation of Best Practices (“Committee”) and a single Technical Secretary, both entirely appointed by the Honduran President. The Committee would have oversight responsibilities, and the Technical Secretary would exercise both executive and legislative functions over the cities. The ZEDEs would also have their own common-law court systems, which would be subject the Honduran Supreme Court only on constitutional matters. Unlike the original REDs, the ZEDE laws do not explicitly provide for an eventual transition to popular elections.
Since replacing President Porfiro Lobo earlier this year, President Juan Orlando Hernández has strongly advanced the ZEDE effort. In February 2014, he announced that he had contracted a South Korean company to conduct a 10-month feasibility study of potential locations for the first ZEDEs in the southern departments of Choluteca and Valle near the Pacific coast. He also appointed the first ZEDE Committee, which consists of several neo-liberal / libertarian advocates from around the world.

Once again, on May 26, 2014, a constitutional challenge to the zones reached the Supreme Court. This time, with an entirely new composition, the Constitutional Chamber unanimously declared the ZEDEs constitutional. Since that time, the project has been steadily moving forward.

While Honduran Congress’s actions towards the Supreme Court clearly further undermine the rule of law in Honduras, the Supreme Court had strong substantive reasons for holding the ZEDEs constitutional. To be sure, the Supreme Court might have arrived at this conclusion for the ‘wrong’ reasons (i.e., by bowing to political pressure), but there is little in the ZEDE statute or amendment that is truly constitutionally suspect as long as the laws are carefully implemented.

Still, the Honduran government and potential investors need to acknowledge several important considerations to the laws. First, the ZEDEs are not truly autonomous. Nothing in the ZEDE laws attempts to prevent Congress from exercising within the model cities any of the powers Congress exercises in the rest of the country. Thus, ZEDEs are still susceptible to interference from future, less supportive Honduran governments.

Secondly, the Honduran Constitution may require more democratic participation from ZEDE residents in governance than the ZEDE laws explicitly provide for. The constitution is emphatic that the people are to be sovereign over the country and that their sovereignty is to be exercised through elected representatives, referenda, and other mechanisms of popular control. The degree to which the people will control the ZEDE authorities is still undefined.

Thirdly, foreign property owners in the ZEDEs will need to comply with Article 107, which restricts foreign ownership to certain designated areas. The ZEDE laws do not necessarily conflict with Article 107, though; careful implementation and regulation by the ZEDE authorities can ensure compliance with this provision.
This paper analyzes Paul Romer’s Charter Cities concept and the Honduran ZEDE laws and argues that the ZEDE laws are constitutional under Honduran law. As long as ZEDEs are subject to Congress, have some measure of popular rule, and appropriately regulate foreign ownership of land, nothing in the Honduran constitution necessarily conflicts with them. Since the legal questions surrounding the ZEDEs are substantially similar as those that would confront Romer’s charter cities concept, the analysis simultaneously provides insight into the legality the charter cities concept more broadly. If Romer’s idea is implemented in other countries with similar constitutional provisions to Honduras, many of the same legal questions will be raised, which makes the ZEDE decision an important test case.

Part I delves into the complex history of the ZEDEs’ formation and observes the contrast between the motivations and methods of the Honduran Congress—in effect, the Congress is attempting to spread the rule of law by subverting it. To explain this history, Part I traces the ZEDE’s theoretical origin to Paul Romer’s vision for experimental reform zones in which the rule of law and good governance could evolve free from corrupting entrenched interests and provide migrants with expanded opportunities. It also describes the lengths to which the Honduran National Party has been willing to go to implement the idea.

Part II explains the structure, powers, and responsibilities of the ZEDE governments and provides a substantive analysis of the ZEDE laws. It examines the laws in light of the arguments that successfully invalidated the previous RED laws and raises several other potential constitutional concerns with the ZEDEs. In concluding that the laws are constitutional, it notes a few easily overlooked aspects to the ZEDEs.

Finally, the paper concludes with suggestions for how the ZEDEs laws could be supplemented to better achieve their goals. It argues that if the Honduran government truly wants to create autonomous enclaves that freely experiment and pilot positive public-policy reforms, it could (1) amend Article 206, which prevents Congress from delegating its powers to other entities, to explicitly exclude the ZEDE authorities; (2) pass an additional law explicitly preventing Congress from interfering with the ZEDE authorities except in certain matters; and (3) contract with ZEDE investors, or possibly ZEDE authorities, and make the contracts enforceable under CAFTA or bilateral investment treaties through binding arbitration. This conclusion notes, however, that the more autonomous the ZEDEs become, the more necessary it will be to create
mechanisms for encouraging transparency and removing ineffective governments and replacing them with better ones.

Table of Contents

INTRODUCTION 1

I. PAUL ROMER’S CHARTER CITIES CONCEPT AND OVERVIEW OF ITS IMPLEMENTATION IN HONDURAS 6

A. THEORETICAL ORIGINS OF THE CONCEPT 7
B. IMPLEMENTING CHARTER CITIES IN HONDURAS 11

II. ARE THE MODEL CITIES LEGAL UNDER HONDURAN LAW? 17

1. ZEDE CONSTITUTIONAL AMENDMENT 21
2. ZEDE STATUTE 24
(a) ZEDE Administration 24
(b) ZEDE Judiciary and Dispute Resolution 26
(c) Functions and Powers of the ZEDEs 27
(d) Obligations of the ZEDEs 28

B. ARE THE ZEDE AMENDMENT AND STATUTE CONSTITUTIONAL? WHAT POLITICAL FACTORS WERE AT PLAY IN THE HONDURAN SUPREME COURT’S DECISION? WHAT LIMITATIONS DOES THE CONSTITUTION NEVERTHELESS IMPOSE ON THE ZEDEs THAT ARE NOT REFLECTED IN THE ZEDE AMENDMENT OR STATUTE? 31
1. POLITICAL CONSIDERATIONS TO THE SUPREME COURT’S DECISION ON ZEDEs 31
2. SUBSTANTIVE CONSIDERATIONS TO THE CONSTITUTIONALITY OF THE ZEDE AMENDMENT AND STATUTE 33
(a) Violations of National Territory 34
(i) Constitutionality of the ZEDE Amendment in light of Article 374’s prohibition against amending articles relating to the national territory 34
(ii) Constitutional constraints on ZEDEs imposed by Article 107 35
(b) Violations of Form of Government 39
(i) The ZEDEs and the sovereignty of the people of Honduras 39
(ii) The ZEDEs and the three-branch structure of Honduran government 40
- The ZEDE Amendment does not alter the structure of the Honduran form of government at the national level, thus it does not violate Article 374. 41
- The ZEDE Statute also does not alter the Honduran form of government; in fact, despite the Statute’s affirmation of autonomy for the ZEDEs, Congress still probably retains the ability to exercise any of its powers within the ZEDEs. 41
(c) Violations of Fundamental Rights 44

RECOMMENDATIONS 45
I. PAUL ROMER'S CHARTER CITIES CONCEPT AND OVERVIEW OF ITS IMPLEMENTATION IN HONDURAS

The Honduran government's efforts to create model cities, or special autonomous zones, find their theoretical origin with economist Paul Romer. Romer suggested that developing countries set aside special territories, or charter cities, that could freely adopt and experiment with socially beneficial reforms free from entrenched interests and political instability.

A central difficulty with Romer’s vision, however, lies in its implementation. Creating a charter city depends on the consent of nations that often have unstable political systems and experience high levels of corruption. As an example, in 2009, Marc Ravalomanana, the president of Madagascar, embraced the idea and decided to implement a charter city in his nation.\(^3\) The project stopped shortly afterward, however, when Ravalomanana was forced to step down in a coup that arose for unrelated reasons.\(^4\)

When officials from Honduras’s National Party became attracted to the idea the next year, the odds of successful implementation were arguably even lower than in Madagascar. The National Party climbed to power after the former Honduran President, Manuel Zelaya, was ousted in a coup in 2009.\(^5\) Furthermore, the Honduran Congress has repeatedly amended its constitution over the last several decades and acquired tremendous influence over the Supreme Court. The rule of law is at a very low level, and Honduras is consistently ranked as one of the most violent nations on earth.\(^6\)

The concept seems to fit awkwardly with Honduras for other reasons, as well. Honduras inherited a civil law system from its days as a Spanish colony and the charter cities legislation imposed common law courts for the zones.\(^7\) Also, Honduras has a legacy of colonial domination not by the Spanish, but also by major U.S. banana corporations such as the United Fruit

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\(^4\) Id.


Company, which utterly transformed the Honduran society, environment, and politics throughout the 20th Century.⁸ To charter-city critics, the idea smacks too much of a new colonialism in which Western governments, and perhaps multinational corporations, will again rule over large sections of Honduran territory to the detriment of its workers and land.⁹

Nevertheless, the idea has been propelled forward in recent years by President Juan Hernandez, albeit with significant changes and under significant protest. Paul Romer is no longer involved, the project appears less transparent and democratic, four Supreme Court Judges have been fired after striking the law down, and the project faces continual opposition from various civil society organizations. The first city will likely be built in the Gulf of Fonseca, with assistance from the South Korean government and the South Korean engineering firm, Posco Plantec.

A. Theoretical Origins of the Concept

Paul Romer is an economist and urban scholar at NYU who became well-known in economics circles in 1990 when he published a paper titled *Endogenous Technological Change*.¹⁰ While for centuries economists had developed models explaining raw materials, labor, and capital in economic growth, the paper first introduced a model accounting for the additional factor of technological change. Technological change relies on the emergence, dissemination, and implementation of new knowledge about how other production factors should be combined and used.

Over the next several years, Romer began exploring why some types of knowledge spread more easily than others. In particular, he observed that knowledge about how to govern a society effectively tends to spread and be implemented with more difficulty than technical knowledge. The reason, in his opinion, was that implementing good public policy ideas requires a high level of coordination between people who have entrenched interests in the status quo. Technical ideas, business models, and other private-sector types of knowledge often are not as hindered because competitive markets and low barriers to entry for start-up enterprises force continual change to

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the status quo, leading to constant improvement of products and services to better meet consumer demand.

Thus, to overcome stagnation in public policy, Romer conceived of a public-sector analogue to start-up businesses— independent “charter cities” that would experiment with reforms and compete with existing governments by finding better ways of promoting the public good. The cities would be built on uninhabited land set aside by one or more countries and would attempt to provide better alternatives for both foreign investors and migrants than the institutions in the surrounding developing nations. Foreign investors would be attracted by rules that make the city a more stable place for investment than politically risky developing nations. Migrants from developing nations would be attracted by rules that make the city a better option for finding employment than either making the perilous journey to wealthier nations (where they often will not find legal status) or staying where they are.

Under Romer’s idea, each charter city would establish a charter that would outline the basic privileges of the people who settle there and the responsibilities of the city government. Voluntary mobility, rather than democratic accountability, would fundamentally safeguard the interests of the settlers. In Romer’s original conception, two basic guarantees would have to underlie every charter: (1) The city’s rules would only apply to those who choose to live under them, and (2) the rules would apply equally to all residents. The first principle ensures that people would be able to leave at any time they choose, making submission to the city’s government entirely voluntary and offering people the freedom to choose a different option the moment the city does not provide a better alternative. The second principle ensures that some residents are not favored more than others.

Crucially, Romer believed that to effectively transmit knowledge about how to govern a society effectively, charter cities should have partner governments and institutions from developed nations that assist with the establishment of effective service delivery and institutions. According to Romer, this assistance would not even need to greatly affect the partner nations’ aid budgets. Most, if not all, of the services could be provided by fee. For example, if Canada

\[12\] Brandon Fuller and Paul Romer, *Success and the City*, 15 (Macdonald-Laurier Institute, Apr. 2012)
were a partner nation, the city could pay the Royal Canadian Mounted Police to provide police training for the city’s new law enforcement organs.

The charter cities concept also relies on incentive schemes to motivate the government to effectively promote the public welfare. Under Romer’s vision, the city government would own the land the city sits on, following the example of Hong Kong and Singapore. The city would then lease out portions of land to private parties and collect revenue off the leases. The private parties would own the structures built on the land and rent or sell them to others.

City ownership of land would provide a public revenue stream (possibly even avoiding the need for taxes), and also create an incentive for the government to provide effective services. For example, if the city created a well-functioning education system that developed residents’ capabilities, the residents would be able to work in higher-skilled occupations and enhance the city’s culture. This, in turn, would attract new and diverse employers and raise the value of the land. As the value of the land increases, the city government will be able to collect more revenue from its leases. Well-functioning law enforcement, infrastructure, parks, etc. would all have a similarly positive effect on land value. This incentive system would provide more security for the public good than city officials’ sense of public duty or concern for international reputation.

Romer is quick to observe that the charter city idea is not unprecedented. Hong Kong and Macao were the most direct inspiration for Romer. Since the British handed over control of the area in 1997, Hong Kong has retained a special autonomy from the People’s Republic of China under a “One Country, Two Systems” policy. Hong Kong’s “charter” is the Hong Kong Basic Laws, which outlines the relationship the city has with China, the functions of the Hong Kong government, and the rights of Hong Kong residents. By establishing property rights and liberal economic policies, Hong Kong became an enclave from the Chinese authoritarian brand of communism and led to remarkably rapid development in an otherwise impoverished region.

The fact that the city retained independence even throughout the political turmoil of the Chinese

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14 XIANGGANG JIBEN FA [THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA], Preamble
15 Id.
Cultural Revolution in the 1960s also speaks in favor of charter cities’ chance of success. In 1979 Chairman Deng Xiaoping mimicked Hong Kong by establishing other enslaved cities within China called special economic zones (“SEZs”).¹⁷ The Chinese government used its SEZs to test free-market reforms that were later adopted more broadly across the entire country.¹⁸

Other historical precedents to the charter cities concept cited by Romer include Pennsylvania.¹⁹ Charles II granted Pennsylvania to William Penn by charter to experiment with the then unprecedented concept of freedom of religion. Pennsylvania (and its main “charter city,” Philadelphia), Hong Kong, and China's SEZs all served as laboratories for the governments neighboring them to test the efficacy of new ideas. The lessons learned from them dramatically reinvented entrenched ideas about government.

Romer also draws analogies to the world of private, small business startups.²⁰ After years of serving large corporate customers, IBM settled into an entrenched business model that hindered it from appropriately responding to the new, rising demand from home consumers. Small startups like Dell and Apple were flexible and innovative enough to better reach these customers. The lesson is that allowing new, small entities to enter a market and challenge old ideas is necessary for progress and the creation, spread, and implementation of new knowledge. This lesson has been understood in business so well that some large, established businesses will purposely create startups of their own, called “skunkworks,” and give them the freedom to experiment with new business models. Retailer Target is one example of a skunkworks that became tremendously successful.

Of course, with every successful startup, there are many more failed startups, and Romer’s theory may require more study of the consequences of charter cities that fail. A competitive private market can sustain large numbers of failed companies because of the volume of other companies that will succeed and fill in the gap. However, the same principle may not apply to a public “market” for governments. Presumably, most migrants to a young, failed startup

¹⁷ Id.
¹⁸ Yeu-man Yeung, Joanna Lee, and Gordon Kee, China’s Special Economic Zones at 30, 50 EURASIAN GEOGRAPHY AND ECONOMICS 222 (2013).
²⁰ Id.
government could easily move and select another government. But if a charter city were more established and failed, many more residents would have grown dependent on the city and might be less mobile. Therefore, the Charter Cities concept may want to draw from studies of the consequences of governments that fail and address this concern.

Still, setting the concern over failure aside, the premise behind charter cities is that positive changes to an institution, whether it is a government or a business, are not easily accomplished by working from within the institution. Reforms often originate from new institutions testing new ideas. The idea of the charter city attempts to accelerate the development of good public policy by creating new jurisdictions that experiment with reforms that, if successful, could then spread to other governments. Much as both private entrepreneurs and independent cities like Hong Kong have forced bureaucratic and ineffective systems to progress and better satisfy public demands, charter cities could force larger governments to enact positive reforms by providing the world with better institutions.

B. Implementing Charter Cities in Honduras

In 2009, Juan Orlando Hernández, who was then the President of the Honduran National Congress, heard Romer's pitch on a TED talk and brought him to Honduras. Porfiro Lobo, the President of Honduras, embraced the idea along with Hernández and the two formulated constitutional amendments and legislation creating Special Development Regions, or Regiones Especiales de Desarrollo (“REDs”).

The amendments and legislation were met with nearly unanimous support from both the conservative majority National Party and center-right minority Liberal Party. On February 17, 2011, the Honduran Congress ratified the RED Amendment, which allowed Congress to establish REDs. An English translation of the resulting 2012 Honduran Constitution, as

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21 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [CONSTITUTION OF HONDURAS], art. 329 (as amended Jan. 2011).


amended, is attached as Appendix A.\textsuperscript{24} Then, on July 29, 2011, Congress passed the RED Statute,\textsuperscript{25} which provided the governing law of the REDs. An English translation of the Statute is attached as Appendix B.

Under the laws, the REDs would consist of large-city-sized territories governed by nine-member “transparency commissions” and governors to manage each RED.\textsuperscript{26} President Porifiro Lobo would to appoint the commissioners and the first governors.\textsuperscript{27} Thereafter, the transparency commission of each city would appoint the subsequent governors.\textsuperscript{28} Only after an RED achieved certain institutional benchmarks would its residents democratically elect their leaders.\textsuperscript{29}

All seemed to be going according to plan over the next year. Honduras chose a 1,000 square kilometer plot of land on the Carribbean coast for the first city.\textsuperscript{30} The Garifuna, an indigenous group, contested the site selection, claiming that the land was theirs.\textsuperscript{31} President Lobo appointed a temporary transparency commission for the RED including Paul Romer and other well-regarded development practitioners, such as Nancy Birdsall, founding president of the Center for Global Development.\textsuperscript{32}

Romer then began travelling to developed nations looking for partners to commit to assisting the planned RED.\textsuperscript{33} The Supreme Court of the Republic of Mauritius, a small African island nation noted for its legal system and economy, agreed in principle to serve as an appellate court for the RED courts, which would apply common law.\textsuperscript{34} Cases appealed from an RED’s highest court would be heard there, and, because Mauritius is in the British Commonwealth, could be further

\textsuperscript{24} This version of the Constitution includes the invalidated RED Amendment but not the more recent ZEDE Amendment. A version of the Constitution incorporating the ZEDE Amendment does not yet appear available.
\textsuperscript{25} Decreto Legislativo No. 123-2011, 29 July 2011 [hereinafter “RED Statute”].
\textsuperscript{26} RED Statute, arts. 4, 15, 26; Charter Cities, Update on Honduran Progress, 1–2 (December 2011), available at http://chartercities.org/resources
\textsuperscript{27} Id. at art. 80.
\textsuperscript{28} Id. at art. 30.
\textsuperscript{29} Id. at art. 36.
\textsuperscript{32} Charter Cities, Update on Honduran Progress, 2 (December 2011), available at http://chartercities.org/resources
\textsuperscript{33} The Economist, supra at 30.
\textsuperscript{34} Fuller and Romer, supra at 12.
appealed to the Privy Council in the UK. According to Romer, using well-respected external courts would provide an added layer of legitimacy, accountability, and impartiality to the REDs’ judicial systems.

Still, Romer could not find a developed nation that was willing to become a full partner to help supervise the REDs; something Romer believed was crucial to his charter cities concept but to which the Honduran government did not seem committed. The Honduran government apparently grew impatient and, without Romer's or the rest of the transparency commission's knowledge, President Lobo signed an agreement in September 2012 with MGK, a private development company to build the first three cities. Romer resigned from the commission and speculation rose that the cities would be privately run.

Shortly afterward, a constitutional challenge against the REDs reached the Honduran Supreme Court of Justice, alleging that they violated unamendable provisions of the constitution concerning sovereignty, form of government, and national territory. The RED laws were challenged on the basis that they effectively surrendered Honduran territory to foreign entities and therefore violated unamendable provisions of the constitution protecting sovereignty, form of government, and national territory. Under Honduran law, the five-justice Sala de lo Constitucional, or “Constitutional Chamber,” hears challenges against the constitutionality of

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37 See supra text accompanying notes Error! Bookmark not defined.–Error! Bookmark not defined. (explaining Romer’s view that having a developed nation partner was important to ensure good government within the charter city).

38 Interview with Brandon Fuller, Deputy Director at NYU Stern Urbanization Project (Feb. 11, 2014) (notes on file with author).


40 Id.

laws. If the Constitutional Chamber’s decision is unanimous, it is final. If the decision is divided, the entire 15-justice Supreme Court decides the case by majority vote.\(^4^3\)

On October 2, 2011, the Constitutional Chamber ruled 4–1 in favor of declaring the RED Amendment unconstitutional.\(^4^4\) On October 18, 2011, the entire court affirmed this decision with a vote of 13–1, thereby invalidating both the RED Amendment and, by extension, the RED Statute.\(^4^5\) The opposing party's brief challenging the REDs and the opinion of the Public Ministry,\(^4^7\) which also opposed the REDs, are attached as Appendix C.

Later that year, the Supreme Court again struck down another effort of Honduran President Porfiro Lobo,\(^4^8\) which prompted Lobo to speak out angrily against the Court.\(^4^9\) Congress, led by President Lobo’s majority National Party, then passed a law removing and replacing four justices, all of whom had voted against the RED Amendment earlier that year.\(^5^0\) After a fifth replacement the following year,\(^5^1\) all seats of the Constitutional Chamber are now filled with new congressional appointees.\(^5^2\) Since the Constitution entitles judges to seven-year terms, the


\(^4^3\) Id.


\(^4^5\) Id.

\(^4^6\) Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice.

\(^4^7\) Dictamen del Ministerio Público, Republica de Honduras, Case No. 769-11, Supreme Court of Justice, signed by Xiomara Yamileth Osorio Velasquez, Public Prosecutor [hereinafter “Public Ministry Opinion”].


\(^5^0\) Compare Decreto Legislativo No. 191-2012, art. 1 L.G., 29 Dec. 2012 (replacing Rosalinda Cruz Sequeira, José Francisco Ruiz Gaekel, José Antonio Gutiérrez Navas, and Gustavo Enrique Bustillo Palma) with Supreme Court Chamber Declares Model Cities Law Unconstitutional, HONDURAS WEEKLY (Oct. 3, 2012), available at http://www.hondurasweekly.com-national/item/12865-supreme-court-chamber-declares-model-cities-law-unconstitutional (stating that the Constitutional Chamber justices who voted against the law were José Francisco Ruiz Gaekel, José Antonio Gutiérrez Navas, Gustavo Enrique Bustillo Palma, and Edith María López) and Corte declara inconstitucional decreto que crea “ciudades modelo,” PAÍS (Oct. 18, 2012) (explaining that all of the justices of the full Supreme Court voted against the REDs except for Oscar Chinhilla, who voted in favor, and Jorge Avilés, who voted neither for or against the REDs).

\(^5^1\) Oscar Chinhilla, the only vote in support of the REDs in the Constitutional Chamber, stepped down to head the Public Ministry and was lawfully replaced with Lidia Cardona. Decreto No. 214-2013; Estela Cardona Asume Como Magistrada de la CSJ, EL HERALDO (Sept. 6, 2013), available at, http://www.elheraldo.hn/Secciones-Principales/Al-Frente/Estela-Cardona-asume-como-magistrada-de-la-CSJ.

legality is in question but the Supreme Court has not heard the matter because it states that none of the judges are impartial on the matter. \textsuperscript{53} Congress justifies its law under Article 205(20) of the Constitution, which permits it “to approve or to disapprove the administrative conduct of the . . . Judicial Power.” \textsuperscript{54}

With a new Supreme Court, Congress renewed its attempt to implement the model cities with new legislation establishing Zones for Employment and Economic Development, or Zonas de Empleo y Desarrollo Económico (“ZEDEs”), which appear functionally similar to the invalidated REDs. The ZEDEs were supported by a new constitutional amendment (“ZEDE Amendment”), \textsuperscript{55} which is attached as Appendix D. On June 12, 2013, Congress then passed a statute to govern the ZEDEs (“ZEDE Statute”), \textsuperscript{56} which is attached as Appendix E. Congress also passed a law creating a program team to promote the ZEDEs; reach out to interested investors; and to channel dialogue at a technical level between states wishing to support the ZEDE’s development of legal, economic, and administrative best practices. \textsuperscript{57}

At the beginning of 2014, Juan Orlando Hernández replaced Porfiro Lobo as President and began aggressively promoting the ZEDEs. \textsuperscript{58} He argued that the ZEDEs would address the “race to the bottom” that often occurs among competitive governments because the cities would be evaluated not just based on economic performance, but also legal, administrative, and political factors (collectively, “LEAP” factors). \textsuperscript{59} Rather than simply offering isolated incentives to foreign investors, such as the promise of cheap labor, the ZEDEs would attract investment by fostering environments marked by the rule of law, efficiency, security, and transparency. \textsuperscript{60}

\textsuperscript{53} Rosemary Joyce and Russel Sheptak, \textit{Constitutional Death Spiral in Honduras}, UPSIDE DOWN WORLD.ORG (Jan. 21 2013). Congress justifies its law under Article 205(20) of the Constitution, which permits it “to approve or to disapprove the administrative conduct of the . . . Judicial Power.” Decreto No. 191-2012; Honduran Constitution (2012), art. 205(20).

\textsuperscript{54} Decreto No. 191-2012; Honduran Constitution (2012), art. 205(20).

\textsuperscript{55} Decreto Legislativo No. 236-2012, L.G., 24 Jan. 2013 [hereinafter “ZEDE Amendment”].

\textsuperscript{56} Decreto Legislativo No. 120-2013, L.G., 6 Sept. 2013 [hereinafter “ZEDE Statute”].

\textsuperscript{57} Decreto Legislativo No 153-2013, L.G. 5 Aug. 2013 (replacing the earlier Program for the Promotion and Research of the RED).


\textsuperscript{59} Id.

\textsuperscript{60} Id.
On February 6, 2014, Cabinet Secretary Ebal Díaz announced that the first ZEDE model city would be situated either in the department of Choluteca or Valle, both of which are on the southern, Pacific coast. On February 10, President Hernández announced that he was initiating a feasibility study of potential locations for the first city within Choluteca and Valle with cooperation from the South Korean government. According to Díaz, the South Korean company Posco Plantec will conduct the study over the next 10 months, taking into account considerations including the environment, population, governance, trade, and participation of “various companies that have participated in this joint effort.”

The following day, the government announced the members President Hernández had appointed to the first 21-member “ZEDE Committee for the Implementation of Best Practices”, which, will have authority over much of the administration of the first ZEDE, as described in Part II.B. below. The Committee includes several strongly neo-liberal / libertarian advocates from around the world including Grover Norquist, the founder of Americans for Tax Reform; Mark Klugman, a former speech writer for Ronald Reagan; Mark Skousen, an economist and former President of the Foundation for Economic Education; Richard Rahn of the libertarian Cato Institute; Surse Pierpont, the General Manager of Colon Import and Export in Panama; Salem Ben Nasser Al Ismaily, Special Envoy of the Government of Oman; and Kahka Bendukidze, former Minister of Economy for Georgia. A full list of the appointees is included in Appendix F.

According to Honduras news sources, the top sites under consideration are Amapala (which is on an island in the Gulf of Fonseca), Choluteca city, and El Triunfo in Choluteca department and

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61 “Departments” are Honduran sub-national regional governments, conceptually similar to U.S. States.
64 Isabella Loaiza Saa, First ZEDEs Set to Take Off in Southern Honduras, PAN AM POST.COM (Feb. 10, 2014), available at http://panampost.com/isabella-loaiza-saa/2014/02/10/first-zede-ready-to-take-off-in-southern-honduras/. It is not yet clear which companies have participated.
San Lorenzo, Goascoran, La Alianza, and Nacaome in Valle department. The ZEDE website lists 11 other potential sites scattered throughout the southern, Pacific coast; the northern, Atlantic coast; and the interior.

On February 8, 2014, a new constitutional challenge was filed against the ZEDE laws and accepted by the newly constituted Constitutional Chamber. The Constitutional Chamber submitted the challenge to former Supreme Court Justice Oscar Chinchilla for comments. Oscar Chinchilla, now the Public Prosecutor, was the sole Supreme Court Justice to vote in favor of the REDs when they were ruled unconstitutional in 2011.

On May 26, 2014, the Constitutional Chamber of the Honduran Supreme Court unanimously declared the ZEDE Amendment and Statute to be constitutional. As of June 27, 2014 the project has aggressively moved forward with the help of the South Korean government and Posco Plantec. The Honduran government has also been promoting the idea to its neighbor, El Salvador, which is considering a proposal.

II. ARE THE MODEL CITIES LEGAL UNDER HONDURAN LAW?

Even though the Honduran constitution was amended to provide for the ZEDEs, the ZEDE’s may nevertheless be deemed unconstitutional. The Honduran Supreme Court can declare even constitutional amendments to be unconstitutional if they attempt to amend certain provisions safeguarded from amendment. Article 374 of the Honduran Constitution renders certain provisions immutable, including articles “relating to the form of government [and] the national

72 The Public Prosecutor is the Honduran equivalent of the U.S. Attorney General.
73 Id.
territory,” the amendment procedure, Article 374 itself, and certain limitations on who can become President.⁷⁶ Thus, constitutional amendments that purport to amend these articles violate Article 374 and can be declared unconstitutional.⁷⁷ As long as an amendment does not violate Article 374, Congress can otherwise amend the Constitution with relative ease. Amendments only need a 2/3 majority of all members of Congress voting in two consecutive annual sessions.⁷⁸

In the prior challenge to the constitutionality of the RED Constitutional Amendment and Statute, the Honduran Supreme Court held that the RED Amendment was in violation of Article 374. The Court did not issue its own opinion, but it relied on reasoning included in briefs submitted by the claimants and the Public Ministry.⁷⁹ These briefs argued that, while the Amendment on its face merely amended articles 304 and 329—both of which are susceptible to Congressional amendment—the Amendment also effectively altered constitutional provisions relating to the national territory and the form of government, which cannot be amended according to Article 374.⁸⁰ Furthermore, the briefs argued that the Amendment violated fundamental rights of Honduran citizens enshrined in both the National Constitution and international treaties to which Honduras was a party.⁸¹ Because the RED Amendment was unconstitutional, the RED Statute was, by extension, also deemed unconstitutional.⁸²

⁷⁶ HONDURAN CONSTITUTION (2012), art. 374.
⁷⁷ Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice. p.1, 2.
⁷⁸ See HONDURAN CONSTITUTION (2012), art. 373 (providing that amendments pass with a 2/3 vote of all members of Congress and are ratified by a 2/3 vote in the subsequent regular annual session). The ability to liberally amend the Constitution has led to significant tension between Congress and the Supreme Court over the powers allocated to each. For example, in 2002 Congress passed a Constitutional amendment giving itself the right to interpret the Constitution in place of the Supreme Court. Joyce and Sheptak, Constitutional Death Spiral in Honduras, UPSIDE DOWN WORLD.ORG (Jan. 21 2013), available at http://upsidedownworld.org/main/honduras-archives-46/4085-constitutional-death-spiral-in-honduras. The Supreme Court declared this amendment to be unconstitutional in 2003. Id. Congress has since refused to let this decision be published, which does not technically make the Court’s ruling ineffective but nevertheless means that the invalidated amendment is still included in the text of the official Constitution. See HONDURAN CONSTITUTION (2012), art. 205 (10) (providing Congress with the power “to interpret the Constitution of the Republic in ordinary sessions, in one sole legislature with two-thirds of the votes of the totality of its members”). A claimant would have to bring a case challenging Congress’s reliance on the amendment to remove it from the text of the Constitution. Joyce and Sheptak, supra.
⁷⁹ See Corte declara inconstitucional decreto que crea “ciudades modelo,” PAÍS (Oct. 18, 2012), available at http://www.elheraldo.hn/Secciones-Principales/Pais/Inconstitucional-decreto-de-ciudades-modelo (explaining that the Court’s decision was based on these briefs).
⁸⁰ Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 1; Public Ministry Opinion, 6–7.
⁸¹ Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 1; Public Ministry Opinion, 8.
⁸² Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 8.
Nevertheless, in contrast with the Supreme Court’s ruling on the RED laws, the ZEDE Amendment and Statute are probably constitutional, even though ZEDE autonomy under them is more tenuous and restricted than many people may realize. This section will first explain the effect of the ZEDE Amendment and the ZEDE Statute, and distinguish them from the unconstitutional RED laws. It will then analyze the constitutionality of these laws against arguments to the contrary.

The following briefly summarizes the questions and answers of each of these subsections:

1. How does the new ZEDE Amendment change the Constitution and what will the administration, powers, and obligations of the model cities be under the ZEDE Statute?

The ZEDE Amendment provides for the creation of the model cities as independent areas for promoting economic development and stipulates that both Congress and a plebiscite of residents must approve their creation. The Amendment also weaves ZEDEs into the framework of subnational governing entities under the Honduran national government and incorporates ZEDE courts within the Honduran judiciary.

Under the ZEDE Statute, each ZEDE administration will consist of a Committee for the Implementation of Best Practices (“Committee”), which will establish general policy guidelines for the ZEDEs; a Technical Secretary, who will have both legislative and executive powers over the ZEDEs; and a common law judiciary that is independent from the rest of the Honduran judiciary. All ZEDE officials are appointed, not popularly elected, and the ZEDE Statute does not contemplate a future transition to popular elections or the creation of a distinct legislative body as the RED Statute envisioned.

Many of the functions, powers, and obligations of the ZEDEs will be the same as the REDs; though there are a few significant distinctions. Like the REDs, the ZEDEs are empowered to establish independent policies and regulations that promote transparent, competitive, and stable legal and economic environments in which large cities can develop. The ZEDE Statute also explicitly subjects the ZEDEs to the Honduran Constitution, international treaties, and a narrow set of national laws, though, as discussed in Part III, it is probably not effective to prevent Congress from applying other laws to the ZEDEs.
Unlike the REDs, the ZEDEs can either be limited-purpose jurisdictions—including “international financial centers,” “special agricultural zones,” or “social mining zones”—or they can be more general “autonomous cities.” Also unlike the REDs, the ZEDEs are not empowered to engage in foreign relations or regulate immigration across their borders. The ZEDEs also must allocate 12% of their tax revenue to trusts designated for specific types of development programs instituted at national and sub-national levels.

2. Will the ZEDE Amendment and Statute be declared constitutional in Honduras? If they are deemed constitutional, what limitations does the Constitution nevertheless impose on the model cities that are not reflected in the ZEDE Amendment or Statute?

Both the ZEDE Amendment and Statute probably will be declared constitutional. As a civil law institution, the Supreme Court does not need to analyze the ZEDEs in the same way it analyzed the REDs. Thus, it is free to apply entirely different reasoning.

Both political and substantive considerations are highly relevant to the Supreme Court’s decision on the constitutionality of the ZEDEs. Politically, Congress has replaced all four of the justices who voted against the REDs in the Constitutional Chamber with justices who will probably have a favorable view of the ZEDE Amendment and Statute. If all justices in the Constitutional Chamber vote in favor of the ZEDE Amendment and Statute, which is likely, the ZEDEs will be declared constitutional.

Political considerations aside, the ZEDE Amendment is probably actually constitutional because it does not appear to alter any of the provisions of the Constitution barred from amendment. The constitutionality of the ZEDE Statute is a little less certain, mainly because it does not allow the people residing in the ZEDEs to elect their leaders.

Still, if the ZEDEs are to remain in compliance with the Constitution, they will be subject to constitutional provisions and national government policies in more ways than the ZEDE Statute suggests or investors may realize. For example, constitutional prohibitions on foreign ownership of land adjacent to national borders or within 40 kilometers of the coast will restrict either the location of ZEDEs or the rights of foreign investors in the ZEDEs. Also, the ZEDEs autonomy depends entirely on the will of the Honduran Congress. The ZEDEs will have no legal authority to prevent the National Congress from imposing taxes in the ZEDEs, disapproving of ZEDE
budgets, regulating trade in the ZEDEs, and exercising other constitutionally granted powers Congress may one day choose to exercise. Finally, employers in the ZEDEs will need to comply with the stringent labor protections provided in the Constitution.

A. How Does the New ZEDE Amendment Change the Constitution and What Would the Administration, Powers, and Obligations of the Model Cities Be Under the ZEDE Statute?

After losing at the Supreme Court, President Lobo and his National Party began reformulating the RED concept and emerged promoting a new constitutional amendment and statute creating ZEDEs. The ZEDE Amendment attempts to avoid some of the constitutional problems with the RED Amendment, and the ZEDE Statute fits the ZEDEs within the new constitutional framework provided under the ZEDE Amendment. The most substantive differences between the ZEDEs and the REDs are that ZEDEs are unable to engage in international relations or handle immigration; residents have more say in the initial decision to establish a ZEDE over their area; and, at the same time, ZEDE administrations are less likely to ultimately become democratic.

1. ZEDE Constitutional Amendment

The ZEDE Amendment altered Articles 294, 303, and 329, which relate to, respectively, subnational governments, the judiciary, and economic development. The changes appear designed to address some of the Honduran Supreme Court of Justice’s concerns over the RED Amendment relating to form of government and territoriality. They also appear to re-envision the nature of the special zones. Significantly, the Amendment did not stipulate that the zones are necessarily to have an urban character, like the REDs; instead, it explicitly envisions that some will have a population density lower than the average for rural areas.

With respect to concerns over the ZEDE’s effect on the Honduran form of government, Congress amended Articles 294 and 303. Article 294 divides the country into subnational regional governments known as “Departments” and, within them, corporate municipalities. The ZEDE

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84 Compare RED Amendment, art. 329 (providing that REDs are to be “of urban character”) with ZEDE Amendment, art. 1 (amending Honduran Constitution, art. 329 to allow for ZEDEs and applying special provisions to ZEDEs with low population density).
Amendment clarified that this structure did not prevent Congress from also creating ZEDEs. Also, the ZEDE Amendment altered the structure of the judiciary by adding the following italicized language to Article 303: “The judiciary consists of a Supreme Court of Justice, by the Court of Appeals, the Courts, courts with exclusive jurisdiction in special zones, and other institutions provided by law.” The addition to Article 303 perhaps attempts to give ZEDE courts a more fundamental place in the judicial structure of Honduras than the previous RED Amendment gave to RED courts. The RED Amendment only allowed for its courts by stating that a prohibition against the creation of special courts of exception contained in Article 304 did not apply to the REDs. The ZEDE Amendment also attempts to distance the ZEDE courts from some of the congressional tampering that pervades the rest of the Honduran judiciary by placing the power to create ZEDE courts and appoint judges to them with Honduras’ Judicial Council rather than Congress. The ZEDE courts may require binding arbitration and may adopt legal systems or traditions from other foreign jurisdictions, provided that they respect human rights and provide equal or better protection than the Honduran legal system.

The ZEDE Amendment also includes a few more provisions relating to sovereignty and territoriality than the RED Amendment. Like the REDs, the ZEDEs are to be subject to Articles 12, 13, 15, and 19 of the Constitution, as well as to the national government in matters related to sovereignty, national defense, foreign relations, electoral matters, and issuing identity and passport documents. The ZEDE Amendment further stipulates that ZEDEs are also subject

85 ZEDE Amendment, art. 1 (explaining that the division of the country into Departments and Municipalities does not prevent Congress from placing certain areas under “special arrangements under Article 329”).
86 Id. (“El Poder Judicial se integra por una Corte Suprema de Justicia, por las Cortes de Apelaciones, los Juzgados, por tribunales con competencia exclusive en zonas del país sujetas a regimens especiales creados por la Constitución de la República y demás dependencias que señale la ley.”)
87 See HONDURAN CONSTITUTION (2012), art. 304 (excepting RED courts from the prohibition against the creation of “special jurisdictional organs of exception”).
88 Compare HONDURAN CONSTITUTION (2012), art. 304 (providing that judges of the REDs must be appointed by Congress) with ZEDE Amendment, art. 1 (providing for creation of courts and appointment of judges by the Judicial Council).
89 ZEDE Amendment, art. 1.
90 Article 12 provides for state sovereignty over airspace, subsoil territory, territorial seas, continental shelf, and similar areas.
91 Article 13 provides that the domain of the nation is “inalienable and imprescriptible.”
92 Article 15 incorporates international law and states that international arbitral and judicial awards are enforceable in Honduras.
93 Article 19 makes it treasonous to sign treaties or grant concessions damaging the territorial integrity, sovereignty, or independence of the Republic.
94 ZEDE Amendment, art. 1; HONDURAN CONSTITUTION (2012), art. 329.
to Articles 10 and 11, which define the territory of Honduras.\textsuperscript{95} It also explicitly permits the creation of a ZEDE in the Gulf of Fonseca—an area along the Pacific Ocean that the International Court of Justice (“ICJ”) placed under the shared control of El Salvador, Honduras and Nicaragua in 1992\textsuperscript{96}—provided that the establishment of the ZEDE complies with the ICJ judgment.\textsuperscript{97}

Perhaps to address some of the concerns over the rights of pre-existing residents, the ZEDE Amendment provides these residents with more control over the decision to establish a ZEDE. Whereas the RED Amendment allowed REDs to be created merely with a 2/3 majority of Congress,\textsuperscript{98} the ZEDE Amendment also requires a plebiscite of residents within the proposed Zone, except in areas of population densities lower than the average for rural areas.\textsuperscript{99} However, to modify or repeal the ZEDE Statute, the ZEDE only requires a referendum or plebiscite in ZEDEs having more than 100,000 residents,\textsuperscript{100} whereas the RED Amendment required a referendum in all cases.\textsuperscript{101}

Additionally, the amended language of Article 329 recasts the ZEDEs in a more humble light than the RED Amendment, which provided a long list of functions for the special zones.\textsuperscript{102} Instead of specifying that they have their own juridical personality, own system of public administration, and own ability to adopt independent legal norms and to sign treaties as the RED Amendment did,\textsuperscript{103} the ZEDE Amendment simply specifies that ZEDEs have legal status, a special tax regime, the ability to incur obligations and sign contracts, and “functional and administrative autonomy, including the functions, powers, and duties” held by ordinary

\begin{footnotesize}
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\item \textsuperscript{95} ZEDE Amendment, art. 1.
\item \textsuperscript{96} See Land, Island, and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), Judgment, 1992 I.C.J. (Nov. 9).
\item \textsuperscript{97} ZEDE Amendment, art. 1.
\item \textsuperscript{98} HONDURAN CONSTITUTION (2012), art. 329.
\item \textsuperscript{99} ZEDE Amendment, art. 1.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} HONDURAN CONSTITUTION (2012), art. 329.
\item \textsuperscript{102} See HONDURAN CONSTITUTION (2012), art. 329 (“The State will establish Special Regions of Development, these being entities created with the proposition of accelerating the adoption of technologies that permit the production and provision of services with a high aggregate value, in a stable environment, with transparent rules[,] able to capture the national and foreign investment that is required for accelerated growth, to create the jobs that are necessary to reduce social inequalities, to grant to the population the services of education, health, public security and the infrastructure necessary that permits a real betterment in the condition of life of the region.”)
\item \textsuperscript{103} Id.
\end{itemize}
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municipalities.\textsuperscript{104} The ZEDE Amendment also states that ZEDEs must adopt the best international and national practices for creating a competitive legal and economic environment on the international stage.\textsuperscript{105}

2. ZEDE Statute

Unlike the RED Statute, which envisioned REDs as general-purpose large urban areas, the ZEDE Statute allows ZEDEs to take a variety of forms, including zones that have a very narrow function. Under the Statute, ZEDEs can be “International Financial Centers, International Logistics Centers, Autonomous Cities, International Commercial Courts, Special Investment Districts, Renewable Energy Districts, Special Economic Zones, Special Agricultural Zones, Special Tourism Zones, Social Mining Zones, Social Forest Zones,” or any other special arrangement or combination of the above classifications.\textsuperscript{106} Allowing for special-purpose regimes in this way appears similar to the special economic zones in Dubai, which include the Dubai International Financial Center, Dubai Internet City, Dubai Healthcare City, Dubai Autozone, and the like.\textsuperscript{107}

(a) ZEDE Administration

The ZEDE Statute provides for an administration that is functionally similar to the administration that was intended to be temporary for the REDs. Rather than providing for an eventual transition to democracy, in which legislative and executive functions would be distinct, the ZEDEs are to remain governed by an appointed body of overseers and an appointed individual with both executive and legislative powers.

Similar to the nine-member Transparency Commission established by the RED Statute,\textsuperscript{108} the ZEDEs are to each have a 21-member Committee for the Implementation of Best Practices (“the Committee”).\textsuperscript{109} The Committees are to consist of members who have “recognized integrity, leadership, executive capacity, and international standing,” in the private sector, non-profit arena,

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\textsuperscript{104} ZEDE Amendment, art. 1.
\textsuperscript{105} Id.
\textsuperscript{106} ZEDE Statute, art. 2.
\textsuperscript{108} RED Statute, art. 26.
\textsuperscript{109} ZEDE Statute, art. 11.
\end{flushright}
academia, or the public sector. Members are appointed by the national President and ratified by Congress and are to meet at regular intervals. The Committee is to appoint and delegate functions to a five-member Standing Committee that will handle regular day-to-day operations.

The most significant functions of each ZEDE Committee are to ratify or veto legislation by its Technical Secretary (described below), establish general policy guidelines for the ZEDE in line with the ZEDE’s objectives, recommend judges or magistrates to the Judicial Council to fill vacancies on the ZEDE’s courts, fill their own vacancies, set aside areas adjacent to the ZEDE to plan for future expansion, hire an internationally recognized audit firm to audit ZEDE resources and report on their use, and perform other functions conferred by law. All of these functions, except for establishing general policy guidelines and setting aside adjacent areas, were also stated functions of the RED Transparency Commissions. Similar to the REDs, the audit firm is to conduct and publish its audit at least once per year and to deliver copies to the national President and Congress.

Instead of a Governor, the highest executive of a ZEDE is to be the “Technical Secretary.” The Technical Secretary serves as the ZEDE’s legal representative and must be a Honduran national by birth who has recognized integrity and “sufficient capacity and merit to perform the office.” Though the ZEDE statute does not specifically indicate how Technical Secretaries are chosen, since they are members of the Standing Committee, they are presumably appointed by the national president and ratified by Congress along with the other committee members. The functions of the Technical Secretary include: implementing the Committee’s policy measures, suggesting measures to the Committee, enacting legislation and submitting it the Committee for ratification, executing ZEDE rules, appointing ad-hoc secretaries to assist his or her

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110 Id.
111 Id.
112 Id.; c.f., RED Statute, art. 28 (not providing for a day-to-day operational committee).
113 ZEDE Statute, art. 11.
114 See RED Statute, art. 28.
115 ZEDE Statute, art. 13; see RED art. 33 (imposing similar requirements on the Audit Committee).
116 ZEDE Statute, art. 12.
117 Id.
118 See id. at art. 11 (providing for presidential appointment and congressional ratification of Committee members).
administration, issuing temporary ordinances to ensure efficient delivery of public services and promote competition, and performing other duties assigned or delegated by the Committee.\textsuperscript{119}

The significant distinction between the Technical Secretary under the ZEDE Statute and the Governor under the RED Statute is that the Technical Secretary appears to be a permanent, non-elected legislative organ. The RED Statute temporarily assigned some legislative functions to the governor but provided that once a RED had reached a certain threshold population and level of economic development, a Normative Council would be elected by universal suffrage of the people residing in the RED.\textsuperscript{120} At this time, the Transparency Commission would recede into an advisory function, the Normative Council would assume lawmaking authority, and the Governor would have the ability to ratify or veto the Normative Council’s laws and the obligation to execute them once adopted.\textsuperscript{121} Interestingly, by not providing for the eventual formation of an equivalent to the Normative Council, ZEDE Statute appears to not provide for any popularly elected administrative organ and to place lawmaking authority into the hands of one person, subject to approval by the rest of the Committee.

(b) ZEDE Judiciary and Dispute Resolution

The ZEDE Statute creates independent, common law courts in the ZEDEs with jurisdiction over all disputes not subject to mandatory arbitration, and it does not provide any explicit right of appeal.\textsuperscript{122} It is unlikely that the Statute intends to provide for appeal from the ZEDE courts to the Honduran Supreme Court. Having a civil law institution, such as the Supreme Court, render binding decisions on common law court judgments would involve significant practical and substantive difficulties. Additionally, the Statute repeatedly emphasizes the independent nature of the courts and allows the courts to rely on precedents from both Honduran and foreign jurisdictions.\textsuperscript{123} The ZEDE Statute does not provide any other explicit right of appeal in lieu of the Supreme Court, either. The RED Statute, on the other hand, created a two-tiered court

\textsuperscript{119} Id. at art. 12.
\textsuperscript{120} See RED Statute, art. 81 (stipulating that the Normative Council would become active when population and economic benchmarks established by the Transparency Commission had been reached).
\textsuperscript{121} RED Statute art. 32, 34–36, 39 (conferring on the Normative Council authority to enact and repeal laws other than those requiring approval of the national Congress, advise the governor on the implementation of public policies, approve the budget, determine the tax scheme, and regulate services or industries).
\textsuperscript{122} ZEDE Statute, art. 14.
\textsuperscript{123} See id. at arts. 14, 18–19 (stating that ZEDEs are subject to independent common law courts, operate without interference, and may rely on precedents from any jurisdiction).
system within each RED, involving a Constitutional Council that heard appeals from lower courts.\textsuperscript{124}

In most other respects, the ZEDE judicial system appears identical to the RED system. Parties dwelling or operating in a ZEDE can contract to settle disputes through arbitration, and the ZEDE courts are to enforce arbitral awards.\textsuperscript{125} The ZEDE courts are empowered to render decisions in law or in equity;\textsuperscript{126} obligated to protect individual rights;\textsuperscript{127} required to provide jury trials for criminal cases;\textsuperscript{128} guaranteed freedom from interference or pressure;\textsuperscript{129} capable of establishing their own police, prosecutorial entities, and penal systems;\textsuperscript{130} and composed of reputable lawyers from either domestic or foreign jurisdictions as long as they have experience in common law.\textsuperscript{131} Moreover, because the courts are common law, their decisions will create a binding precedent for future ZEDE cases.

(c) Functions and Powers of the ZEDEs

The ZEDE Statute articulates the overall function of the ZEDEs similarly to the RED Statute. According to the statute, ZEDEs are to establish independent policies and regulations that foster a transparent, competitive, and stable legal and economic environment, which will help Honduras meet its national goals and enter the global market.\textsuperscript{132} The statute contemplates that ZEDEs will accomplish this by attracting foreign and domestic investment that will introduce high-value technologies, stimulate economic growth, and create jobs, which, in turn, will reduce social inequalities and provide infrastructure, education, health, and public safety services leading to a “real improvement in the lives of Hondurans.”\textsuperscript{133}

To further these aims, the ZEDE Statute confers specific powers on the ZEDEs, many of which were also conferred on REDs. For example ZEDEs are to establish an independent fiscal

\textsuperscript{124} RED Statute, art. 4.  
\textsuperscript{125} ZEDE Statute, art. 14.  
\textsuperscript{126} Id. at art. 18.  
\textsuperscript{127} Id. at arts. 15, 16; see also RED Statute art. 41 (same).  
\textsuperscript{128} ZEDE Statute, art. 18.  
\textsuperscript{129} Id. at art. 19.  
\textsuperscript{130} Id. at art. 22; see also RED Statute, art. 8 (also providing for the courts to establish these entities except specifying that policing can be performed by contracting with an outside police force).  
\textsuperscript{131} ZEDE Statute, art. 17.  
\textsuperscript{132} Id. at art. 1.  
\textsuperscript{133} Id.
regime, with the ability to impose and collect taxes, use revenue for their own purposes, set a budget, establish rates for services, form contracts, and incur debt without approval from the national government provided that the national government is not responsible for the debt. \(^{134}\) They may also establish their own educational, health, civil service, and social security systems, and they must guarantee freedom of conscience, religion, and association; provide public space for assembly; \(^{135}\) and grant labor protection. \(^{136}\)

Regarding property, ZEDEs in urban areas are authorized to recognize private titles to real estate and impose property taxes, \(^{137}\) though land in low-population-density ZEDEs is to be acquired by the Honduran government, with the ZEDE administering it on the state’s behalf and compensating the previous land owners. \(^{138}\) All ZEDE governments are authorized to lease the land they own \(^{139}\) and can expropriate public utilities. \(^{140}\)

The only powers conferred on REDs that are noticeably absent from the ZEDE Statute relate to foreign relations and immigration. Unlike the RED statute, the ZEDE statute does not have provisions allowing ZEDE officials to participate in diplomatic negotiations along with the Honduran government, to directly engage in foreign relations themselves, or to apply immigration controls on entry, stay, or exit. \(^{141}\) Also unlike the RED statute, there are no provisions for dispute resolution for conflicts between ZEDEs and foreign states. \(^{142}\)

(d) Obligations of the ZEDEs

According to the ZEDE Statute, the laws applicable in ZEDEs are the following in order of authority:

(1) The Honduran Constitution;

\(^{134}\) Id. at arts. 4, 23; c.f. RED Statute, art. 49 (same).
\(^{135}\) ZEDE Statute, art. 10; c.f. RED Statute, art. 25 (same).
\(^{136}\) ZEDE Statute, arts. 5, 33; c.f. RED Statute, art. 62 (same).
\(^{137}\) ZEDE Statute, art. 24; c.f. RED Statute, art. 54 (same).
\(^{138}\) See ZEDE Statute, art. 25 (stating that land in low-population-density areas is to be administered by the ZEDE on behalf of the Honduran government and providing for government acquisition of the land); c.f. RED Statute, art. 53 (same).
\(^{139}\) ZEDE Statute, art. 27; c.f. RED Statute art 49 (same).
\(^{140}\) ZEDE Statute, art. 28; c.f. RED Statute art. 52 (same).
\(^{141}\) See RED Statute arts. 67–71 (providing for these powers).
\(^{142}\) See RED Statute, art. 22.
(2) International treaties to which Honduras is a party;

(3) The ZEDE Statute;

(4) Honduran national laws concerning:

(a) the national anthem, national emblem, national flag and other national symbols;

(b) national legislation concerning the Honduran territorial sea and the contiguous zone;

(c) unless superseded by an independent ZEDE code, the Honduran Criminal Code and complementary legislation in force at the time of the ZEDE Statute’s enactment—especially laws concerning drug trafficking, money laundering, human trafficking, genocide, terrorism, child pornography, and child exploitation;

(5) Internal regulations issued or incorporated by the ZEDE.143

This ranking of applicable laws appears at first glance to give ZEDEs considerable autonomy. A ZEDE Technical Secretary and Committee could implement any rules they choose, provided the rules comply with the Constitution, treaties, the ZEDE Statute, and Honduran laws falling into one of the categories in (4). A ZEDE could even replace the Honduran Criminal Code with its own criminal statutes under 4(c).

Nevertheless, the ZEDE Statute, as the third most authoritative source in the ZEDEs, does impose a few significant restrictions on the ZEDEs. For example, ZEDE authorities must allow individuals and businesses to reside in and own, use, or otherwise possess land in the ZEDE regardless of their nationality.144 The RED Statute, by contrast, stated merely that residence in the RED is voluntary and that any Honduran could enter the RED upon showing any national government-issued identification document.145 ZEDEs are obligated to grant equal treatment to all residents except to the degree that the Constitution confers certain privileges on Hondurans by birth.146

143 ZEDE Statute, art. 8, 40, c.f. RED Statute, art. 14 (establishing a similar hierarchy).
144 ZEDE Statute, art. 6. This provision may be significantly qualified by Article 107 of the Constitution as discussed infra Part III.B.1.b.
145 RED Statute, art. 10.
146 ZEDE Statute, art. 9; c.f. RED Statute, art. 24 (same).
The ZEDE statute also restricts state intervention in economic activity. ZEDE authorities are not authorized to impose more than a 12% tax on individual income, a 16% tax on business income, and a 5% sales or value-added tax.\textsuperscript{147} Property taxes and flat taxes are not capped, however. ZEDE authorities may not restrict currency exchange, capital flows,\textsuperscript{148} or trade\textsuperscript{149} and may not tax imports or exports.\textsuperscript{150} Furthermore, the ZEDE cannot void contracts binding it to private parties unless the ZEDE law has been repealed for at least ten years.\textsuperscript{151}

The ZEDE statute also directs use of ZEDE revenue in a new but vague way. Each ZEDE must open one or more trusts to hold all of its revenue.\textsuperscript{152} The Technical Secretary is then to allocate 12% of all tax revenue to any of five specific trusts, each dedicated to particular purposes.\textsuperscript{153} The purposes of each of the five trusts are (1) for strengthening the judiciary, which will include staff scholarships, infrastructure, and equipment for universities (presumably legal in nature); (2) for Department-level community projects in accordance with priorities established by the National Congress; (3) for projects promoting development, infrastructure, security, and social character in accordance with priorities established by the ZEDE Technical Secretary; (4) for sharing among all municipalities in the country to promote their municipal projects; (5) for the Honduran Armed Forces to protect national sovereignty.\textsuperscript{154} The wording of these provisions is ambiguous; it is unclear whether ZEDEs are to divide up 12% of their income equally across all five trusts, or whether they are to allocate the 12% to as many of the trusts as they choose, as long as they give each trust chosen an equal share.\textsuperscript{155} If the latter is true, it is hard to see why a ZEDE would allocate its revenue to any of the trusts besides those that directly benefit the ZEDE, such as (3). Also, the purposes of each trust seem vague and subject to conflicting

\textsuperscript{147} ZEDE Statute, art. 29; c.f. RED Statute, art. 55 (same).
\textsuperscript{148} ZEDE Statute, art. 30; c.f. RED Statute, art. 58 (same).
\textsuperscript{149} ZEDE Statute, art 31; c.f. RED Statute art. 59 (same).
\textsuperscript{150} ZEDE Statute, art. 32; c.f. RED Statute, art. 60 (same).
\textsuperscript{151} ZEDE Statute, art. 45.
\textsuperscript{152} Id. at art. 44.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. ("El doce por ciento (12%) de la recaudación fiscal que hagan las . . . [ZEDEs] dentro de su ámbito especial de competencia debe destinarse a la creación de uno o varios fideicomisos distribuidos en proporciones iguales y para los fines siguientes: (1) Una quinta parte . . . fortalecimiento del Poder Judicial . . . (2) Una quinta parte para . . . proyectos a nivel comunitario . . . (3) Una quinta parte para . . . proyectos de desarrollo, infraestructura, seguridad y de character social . . . (4) Una quinta parte para . . . desarrollo de proyectos municipales . . . (5) Una quinta parte para la defense de la soberanía nacional mediante el fortalecimiento de las Fuerzas Armadas de Honduras.")
interpretations. For example, trust number (1) could either mean the Honduran judiciary at large or the ZEDE’s own judiciary.\textsuperscript{156}

The ZEDE Statute also contains provisions regarding labor, the environment, and indigenous peoples. Besides their obligation to comply with the International Labor Organization standards and labor treaties signed by Honduras,\textsuperscript{157} all employers in the ZEDE must make at least 90% of their workforce Hondurans, who must receive at least 85% of all wages paid by the company, and give preference to Hondurans over equally situated non-Hondurans.\textsuperscript{158} Environmental requirements are more vague: ZEDEs “should adopt policies aimed at the protection and preservation of the environment.”\textsuperscript{159} The ZEDE Statute also requires the ZEDEs to recognize and not violate the property rights that Honduras has granted its indigenous peoples and afro-descendants, such as the Garifuna.\textsuperscript{160} It allows ZEDEs to collaborate with these groups for “cooperation and development programs” as long as their culture and customs are accepted and fully respected.\textsuperscript{161}

**B. Are the ZEDE Amendment and Statute Constitutional? What Political Factors Were at Play in the Honduran Supreme Court’s Decision? What Limitations Does the Constitution Nevertheless Impose on the ZEDEs That Are Not Reflected in the ZEDE Amendment or Statute?**

The new challenge to the ZEDEs required the Supreme Court to once again decide whether the special zones were constitutional. As a civil law institution, the Court did not need to reconcile its decision on the ZEDEs with its earlier invalidation of the REDs and could therefore freely decide the ZEDE statute anew. Both political and substantive considerations likely motivated the Court to uphold the ZEDEs. However, the Constitution imposes significant limitations on the independence of the ZEDEs, which may ultimately undermine the Hernández administration’s long-term ambitions for them unless additional legal protections are introduced.

1. **Political Considerations to the Supreme Court’s Decision on ZEDEs**

\textsuperscript{156} See id. (stating that the trust is for strengthening the “Poder Judicial” (Judiciary)).
\textsuperscript{157} Id. at art. 35; c.f. RED Statute art. 64 (same).
\textsuperscript{158} Id. at art. 36; c.f. RED art. 65 (same).
\textsuperscript{159} Id. at art. 37 (‘Las [ZEDEs] deben adopter politicas orientadas a la proteccion y preservacion del ambiente.’).
\textsuperscript{160} Id. at 43.
\textsuperscript{161} Id.
Given the tenuous state of the rule of law in Honduras, the politics of the justices on the Supreme Court may have factored as greatly as, or more greatly, than the law in deciding whether the ZEDE Amendment and Statute would be struck down as unconstitutional. On this matter, political considerations appear to weigh heavily in favor of upholding the ZEDE Amendment.

Since the RED Amendment was struck down, President Lobo’s National Party of Honduras dramatically changed the composition of the Court. In December 2012, the Supreme Court declared unconstitutional a law empowering President Lobo to fire allegedly corrupt and violent police officers, reasoning that the firing violated the due process rights of the officers.162 President Lobo expressed his anger against the court publicly,163 and his party passed a law removing four Supreme Court justices who were had been opposed to National Party measures and replaced them with four new justices.164 The constitutionality of the law was challenged, but the Supreme Court has been unable to hear the matter because the Chief Justice, Rivera Avilés, cannot find five justices to appoint to the Constitutional Chamber who are considered impartial on the matter.165

All four judges installed by the 2012 law were appointed to the Constitutional Chamber. The one remaining justice, Óscar Chinchilla cast the sole vote in favor of the RED Amendment. Chinchilla stepped down in 2013 to become Public Prosecutor and the National Party-dominated Congress replaced him with Lidia Cardona.166 Thus, all five of the current justices in the Constitutional Chamber were likely to support National Party measures, such as the ZEDE laws. Each of these justices are to serve seven-year terms, keeping them in power until 2019–2020.167

If at least one justice in the Constitutional Chamber were to have held that the ZEDEs are unconstitutional, the matter will go to the full Supreme Court of Justice. Here, the ZEDE laws had a much lower chance of success, given that only four of the original 13 votes against the

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162 *Corte declara inconstitucional decreto de depuración policial*, TIEMPO (Nov. 27, 2012).
163 “*Depuración de la Policía va, aun con oposición de la CSJ*” Lobo Sosa, LA TRIBUNA (Nov. 31, 2012).
164 *Congreso destituye a 4 magistrados de la Corte*, TIEMPO (Dec. 12, 2012).
166 Decreto No. 214-2013; *Estela Cardona Asume Como Magistrada de la CSJ*, EL HERALDO (Sept. 6, 2013).
167 See Decreto No. 214-2013 (stating the terms of the new appointees).
RED Amendment were replaced. The terms of the remaining justices who voted against the RED Amendment will expire in 2016, when they will be replaced by new congressional appointees.

Thus, when the current challenge to the ZEDE laws reached the Supreme Court, it already had a strong chance of finding unanimous approval in the Constitutional Chamber purely for political reasons. Indeed the Constitutionals Chamber unanimously upheld the statute and the matter was never ruled on by the rest of the Supreme Court.

2. Substantive Considerations to the Constitutionality of the ZEDE Amendment and Statute

While political factors likely played heavily in the ultimate outcome of the Court’s decision over the ZEDE Amendment and Statute, they were not the only consideration. The Court still needed to address potential substantive challenges to the laws. Significantly, the Honduran Supreme Court, as a civil law institution, was not bound to its decision on the RED Amendment and Statute and was therefore free to apply contradictory reasoning.

The primary argument against the ZEDE Amendment was that it attempted to amend provisions of the Constitution of which Article 374 forbids amendment. The unamendable provisions under question were the articles relating to the national territory and to the form of government. The most natural interpretation of these prohibitions is to limit their application to Title I, Chapters I (articles 1–8) and II (articles 9–14) of the Constitution, which are titled “Organization of the State” and “The Territory,” respectively. The Amendment also possibly can be struck down if it violates fundamental rights granted under the Constitution and international treaties.

The ZEDE Statute is in theory subject to a broader range of constitutional challenges than the ZEDE Amendment. Constitutional provisions not changed by the ZEDE Amendment will still apply in ZEDEs with equal force as in the rest of Honduras. With this in mind, the ZEDE Statute possibly violates the Honduran Constitution's understanding of popular sovereignty because it fails to provide for democratic control of the ZEDE governments.

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168 See Decreto No. 191-2012 (replacing Jose Francisco Ruiz Gaekkel, Rosalinda Cruz Sequeira, Gustavo Enrique Bustillo Palma, and Jose Antonio Gutierrez Navas); Supreme Court Chamber Declares Model Cities Law Unconstitutional, HONDURAS WEEKLY (Oct. 3, 2012), available at (stating that the Constitutional Chamber judges who voted against the law were José Antonio Gutiérrez Navas, José Francisco Ruiz, Edith María López and Gustavo Enrique Bustillo Palma).
Additionally, even though the ZEDE Amendment and Statute were ultimately declared constitutional, certain provisions of the Constitution nevertheless limit the independence of the ZEDEs in ways not currently acknowledged by the Honduran government. In particular, the ZEDEs will probably still be subject to any laws Congress seeks to apply to the ZEDEs in the future because of the non-delegation provisions in Article 206. Also, Article 107's restrictions on foreign control of land near coasts will influence either the site selection of ZEDEs or the rights of foreign investors within them. Finally, investors in ZEDEs will be subject to the Constitution's stringent labor provisions, few of which are reflected in the ZEDE Statute.

(a) Violations of National Territory

(i) Constitutionality of the ZEDE Amendment in light of Article 374’s prohibition against amending articles relating to the national territory

The scope of Article 374’s prohibition against amendment of articles relating to the “national territory” is likely confined to articles 9–14, which constitute Chapter II of the Constitution. Chapter II is titled “The Territory” and contains basic provisions regarding the area that the Honduran government has sovereignty and jurisdiction over. The ZEDE Amendment attempts to address some concerns over violation of these provisions by stating that ZEDEs are subject to articles 10, 11, 12, and 13. However, to examine the ZEDEs’ constitutionality, one must look beyond these assurances and investigated whether the ZEDE Amendment effectively violate these articles regardless.

Of the provisions relating to the national territory, articles 9–11 outline the territory of Honduras and article 12 states that the Honduran government exercises sovereignty over that territory, as well as its air space, subsoil, territorial sea, contiguous zone, exclusive economic zone, and continental shelf. Article 13, which the challengers to the ZEDE Amendment focused on, stipulates that the Honduran government cannot alienate or prescribe any of its domain outlined in the previous articles. Relatedly, Article 19 prohibits any authority from granting

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169 ZEDE Amendment, art. 1.
170 HONDURAN CONSTITUTION (2012), arts. 9–12.
171 HONDURAN CONSTITUTION (2012), art. 13; Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 7–8; Public Ministry Opinion, 6. Article 14, which is not of concern with the ZEDE Amendments, prohibits foreign states from acquiring real estate in Honduras except as necessary for the seat of their diplomatic missions.
concessions that harm the “territorial integrity, sovereignty, and independence” of Honduras under penalty of treason.\textsuperscript{172}

Previously, the Court accepted the argument that the RED Amendment was the equivalent of a concession that surrendered sovereignty over Honduran territory, thus violating Articles 13 and 19.\textsuperscript{173} Nevertheless, the court had strong reason to not rule similarly with regard to ZEDEs. Neither the ZEDE Amendment or Statute does not completely abdicate sovereignty over Honduran territory. The ZEDEs will still be subject to the Honduran Constitution and treaties to which Honduras is a party.\textsuperscript{174} Moreover, the ZEDE Statute still explicitly reserves control over foreign relations to the national government as well as certain types of national legislation, such as control of territorial sea and the contiguous zone.\textsuperscript{175}

Thus, nothing in the ZEDE Amendment suggests that it necessarily violates the prohibition against amending articles relating to the national territory. When combined with the ZEDE Amendment’s explicit affirmation that ZEDEs will be subject to Honduran sovereignty with regard to national territory, the Court had strong reason to believe ZEDEs will very much be part of Honduras.

\textit{(ii) Constitutional constraints on ZEDEs imposed by Article 107}

While none of the provisions of the Constitution relating to the national territory affect the ZEDE Amendment, other related provisions have significant influence over the ZEDE Statute. The Statute’s ethos of encouraging foreign investment is limited by Article 107 of the Constitution, which circumscribes the right of foreigners to invest in coastal Honduran real estate. This conflict does not necessarily render the ZEDE Statute unconstitutional, but would place limitations on either the location of the ZEDEs or on foreign ownership of property within the ZEDEs.

\textsuperscript{172} \textit{Honduran Constitution} (2012), art. 19.
\textsuperscript{173} Brief of Oscar Humberto Cruz, et al., \textit{Case No. 769-11}, Supreme Court of Justice at 8 (claiming that the RED Amendment changed the republic from a union of 18 departments to a collection of private business corporations); Public Ministry Opinion 6–7 (same).
\textsuperscript{174} ZEDE Statute, art. 8; \textit{see supra} Part II.B.4 (describing the hierarchy of applicable laws in ZEDEs).
\textsuperscript{175} \textit{Id.}
Article 107 prohibits persons not born in Honduras\textsuperscript{176} from “acquir[ing], possess[ing], or occup[y ing] under any title” property located within 40 km of the two oceans; adjacent to boundaries with neighboring states; or on islands, cays, reefs, cliffs, rocks, shoals, and sand banks.\textsuperscript{177} This description encompasses 56.2% (63,220.35 sq. km.) of Honduras’s total surface area.\textsuperscript{178} However, the article suggests its terms may be modified for “urban property, which shall be dealt with by a special law.”\textsuperscript{179}

The “special law” came with Decree 90-90, which allows non-nationals to acquire “urban property” regardless of whether it lies in the areas prohibited by Article 107, but limits the definition of “urban property” to areas declared by the Office of Culture and Tourism to be “tourist areas.”\textsuperscript{180} Acquired property in these areas may be used only for approved “tourism projects” that promote economic development, social development, or the public interest as determined by the Office of Culture and Tourism\textsuperscript{181} or as living quarters for the person acquiring the property so long as the quarters do not exceed 3,000 square meters.\textsuperscript{182} Thus, for non-natural-born Hondurans to acquire any interest in land within 40km of the shoreline, the Office of Culture and Tourism must declare the area encompassing the land to be a tourist area, and the land must be used either for approved tourism projects or as private housing for the person acquiring the property.\textsuperscript{183} Absent these criteria, contracts for the acquisition of coastal land violate Article 107 and are voided.\textsuperscript{184}

\textsuperscript{176} See HONDURAN CONSTITUTION (2012), art. 23 (listing criteria defining “Hondurans by birth”).
\textsuperscript{177} Id. at art. 107.
\textsuperscript{179} HONDURAN CONSTITUTION (2012), art. 107.
\textsuperscript{180} Decree No. 90-90, arts. 2–3.
\textsuperscript{181} Id. at art. 4.
\textsuperscript{182} Id. at art. 5; see also José Rivera Ferrari and Francisco Darío Lobo Flores, \textit{Honduras}, in LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES, AND COUNSEL, Jonathan C. Hamilton, et al. (eds.) (2012) (stating that under Decree 90-90, “foreign natural persons may acquire urban real estate within the cited 40km zone up to an area of 3,000 [square meters] and foreign natural persons or legal entities or Honduran legal entities not controlled completely by Hondurans to acquire urban real estate within the cited zone without, seemingly, a limit on area when the real estate is to be destined for tourism, economic, social or public interest development, qualified so by the Secretary of Tourism,” and subject to his or her authorization).
\textsuperscript{183} On January 7, 2005 the Supreme Court ruled that Decree No. 90/90 was constitutional and many coastal areas have since been declared “urban,” including areas encroaching on land held by the Garifuna, whose reaction has been mixed because the declarations bring employment opportunities but also the erosion of culture and way of life. See, e.g., Keri Vacanti Brondo & Natalie Bown, Neoliberal Conservation, Garifuna Territorial Rights and Resource Management in the Cayos Cochinos Marine Protected Area, 9 CONSERVATION & SOCIETY 91, 96 (2011) (discussing
At first glance, these laws would appear to have severe consequences. Under a strict, textual interpretation, the words “acquiring, possessing, or occupying” in Article 107 would foreclose foreigners from possessing any interest in coastal property, including a leasehold interest or perhaps even a simple right of occupancy. Thus, the Constitution would technically be violated if a Honduran owned property and simply permitted a non-Native born Honduran to live there.

In practice, however, the impact of these laws has been somewhat softened. For example, Honduran authorities appear to actively enforce Article 107 only when it comes to direct foreign ownership, not necessarily indirect ownership through Honduran entities. Thus, foreigners seeking to purchase land in the area prohibited by Article 107 can form a Honduran company, purchase the land in the company’s name, and then occupy it. Therefore, in practice, Article 107 does not prevent foreign investors from occupying and at least indirectly possessing property in the areas it covers.

Even with its softened enforcement, Article 107 is still in tension with the ethos of the ZEDE Statute. The Statute announces an aim to promote foreign investment within the ZEDEs and guarantees the right of individuals and businesses “to reside in and own, use, or otherwise possess land in the ZEDE regardless of their nationality.” ZEDEs are also obligated to grant equal treatment to all residents except to the degree that the Constitution confers certain privileges on Hondurans by birth.

Previously, the Court appeared to read the RED Amendment and Statute’s embrace of foreign investment as a violation of Article 107 and thus ruled the REDs unconstitutional. This step seems unwarranted because nothing in the RED laws directly contradicted Article 107, and neither does the ZEDE Statute. Both can be implemented in ways that satisfy Article 107. Still,
the Constitution will be the highest authority in the ZEDEs,\(^{189}\) thus Article 107 will have a continuing impact over either the location of ZEDEs or over the rights of non-native born Hondurans within them.

The ZEDEs could be established in three ways so as to accord with Article 107. First, they could be located far enough inland and away from national borders to not fall under the prohibition against foreign ownership. As of now, the Honduran government does not appear concerned with this option. All of the top potential ZEDE sites under consideration are within 40 kilometers of the coast, with some also adjacent to national borders, and thus fall in areas described in Article 107.\(^{190}\)

Second, ZEDEs could be located in an area the Office of Culture and Tourism designates as urban for the purposes of Decree 90/90. Under this option, foreign ownership of real estate would be carefully regulated. Any foreign-owned property would need to be restricted either to 3,000 square meter plots for the owners’ residences or to certified tourism activities.

Third, ZEDEs could be located in areas within 40km of the coast or adjacent to the national borders regardless of whether they are in designated “tourist-urban” areas but direct foreign ownership would be prohibited. Under this arrangement, Article 107 would be a qualification on the right conferred in the ZEDE Statute to own property regardless of nationality.\(^{191}\) Non-Hondurans could not directly own property, but could perhaps still “reside in . . . use or otherwise possess” it.\(^{192}\) The ZEDE would still meet its obligation to grant equal treatment, because the Statute explicitly excepts preferences granted to Hondurans by birth under the Constitution, of which Article 107 arguably is.\(^{193}\)

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\(^{189}\) See supra text accompanying note 71 (listing the Honduran Constitution as the highest authority in the ZEDEs).

\(^{190}\) See Esperan con Gran Expectativa Creación de ZEDE en Zona Sur, EL HERALDO.HN (Feb. 9, 2014) (listing Ampala, Choluteca; Choluteca, Choluteca; and El Triunfo, Choluteca as top sites under consideration); Valle Puede Albergar la Primera ZEDE en Honduras, EL HERALDO.HN (Feb. 9, 2014) (stating that San Lorenzo, Valle; Goascoran, Valle; Alianza, Valle; and Nacaome, Valle are the cities in Valle under consideration). Of the other potential sites listed on the ZEDE website, only a few do not fall within Article 107 areas. Potential Areas Map, ZEDE.GOB.HN, last visited on Mar. 23, 2014, available at http://zede.gob.hn/?page_id=108.

\(^{191}\) See ZEDE Statute, art. 6; supra text accompanying note 147 (discussing this right).

\(^{192}\) See Id. (allowing people “to reside in and own, use, or otherwise possess land in the ZEDE regardless of their nationality”).

\(^{193}\) See id., at art. 9; supra text accompanying note 148.
Under the third option, foreign owners could possibly establish Honduran companies to purchase property.\textsuperscript{194} Foreigners could also potentially lease land owned by the ZEDE government or other Honduran entities.\textsuperscript{195} For rural ZEDEs, the ZEDE statute envisions government ownership of all land anyway,\textsuperscript{196} which would presumably avoid any conflict with the Article 107 and Decree 90-90. However, to allow non-native born Honduran occupation of property, whether by organizing a domestic company or through lease, the ZEDEs would need to rely on the Honduran government to continue its current lax application of Article 107.

For these reasons, the ZEDE Statute does not necessarily violate the Honduran Constitution’s limitations on foreign possession of property. However, those limitations will play a significant role over the siting of ZEDEs and the rights of foreigners within them.

(b) Violations of Form of Government

Another central argument against the RED Amendment was that it attempted to alter the provisions establishing the Honduran form of government. The ZEDE Amendment is susceptible to a similar claim. The argument boils down to two concerns: (1) that the amendment violates the provisions regarding popular sovereignty in Article 2, and (2) that it violates the three-branch framework of Honduran government under Article 4 and as elaborated in other articles.

(i) The ZEDEs and the sovereignty of the people of Honduras

Popular sovereignty was a major issue in the challenge to the RED laws.\textsuperscript{197} Article 2 stipulates that the people of Honduras are the true sovereigns over Honduran territory and that this sovereignty cannot be taken away.\textsuperscript{198} Whether ZEDEs violate this principle rests on just how the sovereignty of the Honduran people is to be exercised and whether the people will exercise that sovereignty in the ZEDEs to a degree sufficient to satisfy the Constitution.

\textsuperscript{194} See supra note 146 and accompanying text (explaining this practice).
\textsuperscript{195} See supra note 146 and accompanying text.
\textsuperscript{196} ZEDE Statute, art. 25.
\textsuperscript{197} See Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 9–11 (presenting this argument); Public Ministry Opinion, 7 (same).
\textsuperscript{198} See HONDURAN CONSTITUTION (2012), art. 2 (stating that sovereignty originates from the people and that it is imprescriptible).
First, Article 2 explains that the people’s sovereignty is to be “exercised through representation.” Article 5 further suggests that an additional key element to this exercise will be participatory democracy, which will be implemented through the referendum, the plebiscite, as well as democratic representation. Thus, to comply with the Constitution’s provisions regarding popular sovereignty, the ZEDE Amendment and Statute should, at a minimum, provide popular control through democratic representation—because it appears to be the most emphasized mechanism for exercising sovereignty—and possibly referendum or plebiscite mechanisms.

The ZEDE Amendment, by itself, probably complies with these provisions. The ZEDE Amendment was passed through at least 2/3 of popularly elected representatives in Congress.\(^{199}\) Furthermore, unlike the RED Amendment, the ZEDE Amendment requires the people living in a proposed ZEDE site to approve the creation of a ZEDE by plebiscite.\(^{200}\)

However, continued governance over the ZEDE as outlined by the ZEDE Statute raises additional concerns. The RED Statute was challenged as stripping sovereignty because it did not provide non-RED residents with any control over the REDs, either through elected representatives or any of the popular initiatives.\(^{201}\) This argument appears weak; sovereignty probably cannot require letting people outside a jurisdiction determine what happens inside that jurisdiction because most sub-national governments do not allow non-residents to participate in local elections.

However, the ZEDE Statute goes further in stripping sovereignty than the RED Statute because it does not provide for any popularly elected government officials over the ZEDEs.\(^{202}\) All members of the Committee are appointed by the President and other officials appear to be appointed by Committee members. Unlike the RED Statute, there is no indication that the officials will eventually be chosen through popular elections. Thus, while the ZEDE Amendment likely complies with the Constitution, the ZEDE Statute may not.

(ii) The ZEDEs and the three-branch structure of Honduran government

\(^{199}\) See id. at art. 373 (requiring a 2/3 majority of total members of Congress in two consecutive sessions to pass constitutional amendments).

\(^{200}\) ZEDE Amendment, art. 1.

\(^{201}\) Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 10–11 (presenting this argument).

\(^{202}\) See supra Part II.B.1. (analyzing the administration of ZEDEs and concluding that officials are not elected).
- The ZEDE Amendment does not alter the structure of the Honduran form of government at the national level, thus it does not violate Article 374.

Another central argument against the ZEDEs is that it alters the three-branch structure of government established under Article 4, which Article 374 makes unamendable. Article 4 states that the national government is to be “republican, democratic, and representative” and to consist of a legislative, executive, and judicial branches, “which are complementary, independent, and not subordinate to each other.”

On its face, the ZEDE Amendment does nothing to alter this framework for the Honduran national government; it only appears to make changes at the sub-national level. It amends Article 294 to allow Congress to create ZEDEs as complements to the current 3-tier decentralized structure of government: national government, department governments, and municipalities. It also amends Article 303 to allow Congress to create ZEDE courts with exclusive jurisdiction in addition to the already existing structure of the judiciary. Finally, the ZEDE amendment changed article 329 to give the zones a special tax regime and the status and authority common to ordinary municipalities.

None of these changes alter the three-branch structure of the national government enshrined in Article 4. At the national level, the country will still be governed by executive, legislative, and judicial branches. Thus, the ZEDE Amendment does not appear to amend any of the articles relating to the form of government, of which Article 374 prohibits amendment.

- The ZEDE Statute also does not alter the Honduran form of government; in fact, despite the Statute’s affirmation of autonomy for the ZEDEs, Congress still probably retains the ability to exercise any of its powers within the ZEDEs.

The ZEDE Statute is subject to a few different concerns than the ZEDE Amendment is subject to. For example, as with the REDs, the ZEDEs may be challenged as altering the Honduran form

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203 See Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice 10–11 (arguing that the RED Amendment delegates functions from the three branches of government); Public Ministry Opinion, 11–13 (same).
204 HONDURAN CONSTITUTION (2012), art. 4.
205 ZEDE Amendment, art. 1.
206 Id.
207 Id.; see also supra Part II.A. (explaining the ZEDE Amendments).
of government by unconstitutionally delegating power from the three branches of government to the ZEDEs. The RED Statute was characterized as stripping the functions of the national government and conferring them on domestic or foreign investors, which would establish separate systems of government each operating under their own rules with their own judiciary.208

The ZEDE Statute stops far short of altering the Honduran form of government, however. First, all three branches would continue governing in the same manner over areas not encompassed by the ZEDEs.209 Second, even under the terms of the ZEDE Statute, the ZEDEs would still be subject to the national government authority over foreign affairs, immigration, ratification of treaties, national symbols, the territorial sea, and the contiguous zone.210 The President would also have the power to appoint ZEDE officials.211 Also, the Supreme Court of Honduras would presumably retain the power to decide Constitutional matters arising within the ZEDEs because Constitution would still be the highest authority within the ZEDEs, and the Supreme Court has jurisdiction over constitutional disputes.212

Arguably, the fact that the ZEDE Courts are not subject to the Supreme Court in relation to non-constitutional issues raises concern, but this concern is possibly dealt with through careful drafting of the ZEDE Amendment. The ZEDE Amendment appears to change the Constitution to allow ZEDE courts to be independent entities on all matters not concerning the Honduran constitution. The Spanish wording of the new Article 303 translates as "The Judiciary is composed [por la] Supreme Court of Justice, [por la] the Courts of Appeals, the Courts, [por la] tribunals with exclusive jurisdiction in zones of the country subject to special regimes created

208 Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice, 11.

209 This argument might be weakened if ZEDEs grew to encompass all of Honduran territory. The briefs challenging the REDs suggested this would happen by arguing that the laws would change the country from a Republic of 18 departments to a collection of private corporations. Brief of Oscar Humberto Cruz, et al., Case No. 769-11, Supreme Court of Justice at 8; Public Ministry Opinion 6–7 (same). Even in this hyperbolic situation, however, the Honduran government would still perform the functions outlined below.

210 See supra Part II.B.3–4 (describing the limits of ZEDE authority).

211 See supra Part. II.B.1 (explaining that all ZEDE positions appear appointed).

212 See HONDURAN CONSTITUTION (2012), art. 316 (establishing the Constitutional Chamber and granting jurisdiction over constitutional challenges).

213 Juzgados, which are Honduran trial courts, or courts of first instance.
pursuant to the Constitution, and other dependencies that the law specifies. The italicized portion was added under the ZEDE Amendment. The reintroduction of the words "por la" before describing the ZEDE tribunals might suggest that the ZEDE tribunals are not necessarily subject to the Supreme Court but stand alone and on par with the other tribunals composing the Honduran judiciary.

Most significantly, the ZEDE authorities will have to allow Congress to exercise all of its constitutional powers within the ZEDEs if Congress chooses to exercise them. Under Article 205, the functions assigned to Congress include, among many others, "[t]o make, enact, interpret, amend, and repeal laws"; levying “taxes, assessments, and other public charges”; approval or disapproval of the “budgets of the decentralized and devolved institutions”; control over public revenues; regulation of maritime, land, and air trade; and “any other powers conferred upon it by the Constitution and other laws.” Nothing in the ZEDE Amendment changed Congress’s power to continue performing these functions within the ZEDEs, thus nothing in the ZEDE Statute can block it.

Moreover, if the ZEDE Statute were interpreted as transferring Congress's authority to carry out certain Article 205 functions to the ZEDEs such that Congress could no longer carry out those functions in the ZEDEs, the Statute might be an unconstitutional delegation of authority. Under Article 206, Congress cannot “delegate” any of its Article 205 functions to other entities. It is difficult to know the precise Honduran definition of an unconstitutional delegation of authority. It would be important in making this determination to distinguish between a lawful

214 ZEDE Amendment, art. 1 (“El Poder Judicial se integra por una Corte Suprema de Justicia, por las Cortes de Apelaciones, los Juzgados, por tribunales con competencia exclusiva en zonas del país sujetas a regímenes especiales creados de conformidad a la Constitución, y demás dependencias que señale la ley).
215 Compare this amended Article 303 with the pre-ZEDE Amendment English-language version: “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 CONSTITUTION (2012), art. 303.
216 HONDURAN CONSTITUTION (2012), art. 205(1).
217 Id. at art. 205 (35).
218 Id. at art. 205 (38).
219 Id. at art. 205 (40).
220 Id. at art. 205 (43).
221 Id. at art. 205 (45).
222 In the United States, for example, delegation of legislative authority is permissible only when the legislature has provided “reasonable limitations and standards for carrying out delegated duties,” but more precise standards depend
decentralization of powers from the national government and an unconstitutional delegation under Honduran law.

The ZEDE Statute probably only avoids being an unconstitutional delegation of authority if Congress retains concurrent authority to exercise the powers given to the ZEDEs alongside and within their jurisdictions. Several of the functions Congress assigned to the ZEDEs are similar, if not identical, to the functions Article 205 gives Congress. For example, the ZEDE Statute grants the power to establish an independent fiscal regime, impose and collect taxes, use revenue for the ZEDE’s own purposes, set a budget, establish rates for services, form contracts, and incur debt without approval from the national government provided that the national government is not responsible for the debt. If granting these functions to the ZEDEs is considered a delegation of functions in violation of Article 206, the ZEDE Statute would be unconstitutional.

Thus the autonomy of the ZEDEs appears to exist at the mercy of the National Congress. The ZEDE Amendment and Statute probably preserves Congress’s ability to carry out Article 205 functions within the ZEDEs. Congress's continued ability to tax, regulate trade, and perform the host of other functions it performs nation-wide means that if a less ZEDE-friendly Congress comes to power in the future, it could easily undermine the purported autonomy of the ZEDEs.

(c) Violations of Fundamental Rights

Other constitutional provisions regarding the individual rights of Hondurans will affect the ZEDEs, though they will not necessarily render them unconstitutional. Several arguments were made against the REDs alleging that they violated individual fundamental rights and these arguments will likely be made against the ZEDEs. While none of them are likely strong enough to invalidate the ZEDEs, there are important labor provisions of the Constitution that will limit the autonomy of the ZEDEs.

First, the RED laws were alleged to violate the principal of equal treatment under the law because they would have provided Hondurans living within REDs access to greater job opportunities.

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223 ZEDE Statute, arts. 4, 23.
opportunities, education, health care, and economic stability than Hondurans living elsewhere.\textsuperscript{224} This argument seems weak both in relation to REDs and ZEDEs because the laws do not direct public resources in an unequal manner among Hondurans, but merely allow governments within Honduras to attempt to provide better living conditions for the people within their jurisdictions.

Also, the REDs were characterized as essentially removing territory from the state of Honduras, which violated Constitutional protections against expatriation of Hondurans to foreign states and against compelling Hondurans to change their residence.\textsuperscript{225} As described above, however, the ZEDEs fall far short of removing territory from the Honduran state.\textsuperscript{226}

However, while the ZEDE Statute does not appear to necessarily violate any provisions conferring individual rights, the rights are still applicable in the ZEDEs, and ZEDE administrations will need to acknowledge them. Most significantly, the Honduran Constitution imposes stringent minimum labor conditions for all Hondurans. For example, Article 128 mandates an eight-hour workday and forty-hour work week,\textsuperscript{227} equal pay for equal work,\textsuperscript{228} minimum age requirements,\textsuperscript{229} annual paid vacations,\textsuperscript{230} maternity leave,\textsuperscript{231} and various other requirements.\textsuperscript{232} The ZEDE Statute does not make reference to these provisions, which may mislead investors. Besides stating that employers will be subject to International Labor Organization and other treaty standards, the ZEDE Statute only explicitly adopts Article 137, which requires employers in the ZEDE to make at least 90\% of their workforce Hondurans and to pay them at least 85\% of the company’s total payroll.\textsuperscript{233}

\textbf{Recommendations}

\textsuperscript{224} E.g., Brief of Oscar Humberto Cruz, et al., \textit{Case No. 769-11}, Supreme Court of Justice at 16 (arguing that the laws created privileged classes, which violates provisions guaranteeing equal treatment under the law in the Honduran Constitution, the Universal Declaration of Human Rights, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights).
\textsuperscript{225} Id. at 20 (citing \textsc{Honduran Constitution} (2012), arts. 102 and 81).
\textsuperscript{226} See supra Part III.A. (explaining how the ZEDE laws to not violate the provisions regarding the national territory).
\textsuperscript{227} HONDURAN CONSTITUTION (2012), art. 128(1).
\textsuperscript{228} Id. at art. 128(3).
\textsuperscript{229} Id. at art. 128 (7) (imposing restrictions for workers under sixteen and seventeen).
\textsuperscript{230} Id. at art. 128 (8).
\textsuperscript{231} Id. at art. 128 (11).
\textsuperscript{232} See id. at art. 128.
\textsuperscript{233} ZEDE Statute, art. 36; \textsc{Honduras Constitution} (2012), art. 137; see also RED Statute, art. 65 (same requirement).
The Honduran Supreme Court’s decision not only justified Honduras’ ZEDE project, but it served as an important test case for the legality of Paul Romer’s broader charter cities concept. If Romer’s idea is implemented in other countries, it will likely face legal questions similar to those addressed in this paper and raised by the Honduran Supreme Court.

Still, the zones’ effectiveness depends greatly on continued support from Congress and additional legal provisions. If the Honduran government truly wants to establish zones that will be shielded from corruption and changing politics, it could bolster the ZEDE laws in a few ways. It could provide for more democratic participation in ZEDE governance or implement other mechanisms for promoting transparency and making government responsive and accountable. Additionally, it could implement stronger mechanisms to avoid corruption and unfair subsidies to specific domestic or foreign investors at the expense of the Honduran population. It could also amend Article 107 to allow foreign ownership in the ZEDEs, which should increase beneficial foreign investment.

Furthermore, if the Honduran government truly seeks to make the ZEDEs autonomous and insulated from future outside political changes it needs to implement additional legal protections for the ZEDEs. Its first step would be to amend Article 206 of the Honduran Constitution, which prevents Congress from delegating its powers to other entities. The amendment could provide an exception for delegating powers to the ZEDE governments. The ZEDE Statute could also be amended to more explicitly prohibit application of Honduran laws in the ZEDEs, other than those laws to which the ZEDE Statute already permits, such as provisions of the Constitution.

Amendments may not be enough, however, because a strong congressional majority can amend, and re-amend, the Honduran Constitution relatively easily, as has been demonstrated repeatedly over the last several decades. To address this concern, the Honduran government could consider signing contracts with the ZEDE governments and with investors in the ZEDEs that guarantee autonomy for a defined period. The contracts could provide investors and the ZEDE authorities (if they were private entities owned by non-Honduran nationals) with enforcement under CAFTA or bilateral investment treaties between Honduras and the investors’ states. Disputes under such contracts could then be heard outside of Honduran courts in an arbitration forum, such as the International Centre for the Settlement of Investment Disputes in the World Bank.
By resorting to international arbitration, claims would escape the political pressures that have been shown to weigh heavily on the Honduran judiciary.

Most importantly, provisions securing the independence of ZEDEs should be matched in strength by provisions requiring good governance. In this vein, there may be methods of incentivizing the ZEDE administrations to promote human development, perhaps through transfer schemes from a central fund based on measurable criteria monitored by a reputable international organization. Modifying and clarifying the ZEDE Statute's allocation of revenue to trusts could be one first step toward this goal.

Table of Appendices

Appendix A: Honduran Constitution as of 2012 (unofficial English translation). Articles 304 and 329 of this version still include the RED Amendment, which the Court struck down. It does not contain the ZEDE Amendment's changes to Articles 294, 303, and 329. A version incorporating the ZEDEs does not yet appear available.

Appendix B: RED Statute (unofficial English translation). This statute provided the governing law of the invalidated REDs.

Appendix C: Brief of the party opposing the REDs and the Opinion of the Public Ministry, both of which the Supreme Court relied upon to declare the REDs unconstitutional.

Appendix D: ZEDE Constitutional Amendment. This amended Articles 294, 303, and 329 of the Constitution, which provide for ZEDEs.

Appendix E: ZEDE Statute. This statute provides the governing law of the ZEDEs.

Appendix F: Statute establishing the first ZEDE Committee. This Statute provides the names of all 21 appointees to the first ZEDE's Committee for the Implementation of Best Practices, which will constitute part of the first ZEDE government.