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HISTORY, ENTERPRISE, AND REFORM: HONDURAN ZEDE REGIMES AND INDIGENOUS PEOPLES' RIGHTS

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“They are Indigenous because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of the more powerful sectors of society living on the same lands or in close proximity. And they are peoples in that they comprise distinct communities within a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.”¹

- S. James Anaya (on the definition of Indigenous Peoples)

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¹ JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 1 (Aspen Publishers 2009).

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Introduction

For decades, the situation of Indigenous peoples in Honduras has been closely monitored by the international community. With the passage of legislation in 2013 by the Honduran Government authorizing the creation of *Zones of Economic Development and Employment (ZEDE)*,² the renewed interest in Indigenous peoples' rights in this relatively remote corner of the globe is not without merit. According to current United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, the situation of Indigenous peoples in Honduras is at a critical juncture – one beset by threats to “their rights over their lands, territories and natural resources,” which are “not protected,” and can even provoke acts of violence when Indigenous peoples lay claim to their

² Decreto No. 120-2013, 5 Sep. 2013, La Ley Orgánica de las Zonas de Empleo y Desarrollo Económico (ZEDE) [Zones of Employment and Economic Development Organic Act (ZEDE)], LA GACETA, DIARIO OFICIAL DE LA REPÚBLICA DE HONDURAS, N. 33,220, Sep. 6, 2013, p. A.57.

rights.³ Given that Indigenous peoples comprise only seven percent of the total population of Honduras, and that roughly 80 percent of Indigenous peoples still live on their traditional lands,⁴ the observations of former Special Rapporteur on the rights of Indigenous Peoples, S. James Anaya, seem prescient. The situation of Honduras's Indigenous peoples is complex precisely because of their ancestral relationship with their lands. When this ancient relationship to the land is coupled with the efforts of Indigenous peoples to maintain an identity as a people in the face of the most "powerful sectors of society," it is not difficult to see why legislation aimed at economic development in Indigenous lands such as the ZEDE organic law would be so controversial.⁵

Nevertheless, according to 2016 figures gathered by the World Bank, Honduras is a very poor country facing "major challenges with more than 60.9 percent of the population living in poverty."⁶ In addition, the country faces rampant economic inequality, soaring rates of crime and violence, and an economy that is particularly vulnerable to the whims of export prices which tend to have a disproportionate, adverse impact on the country's poor.⁷ Far from the corridors of power in Tegucigalpa, rural Hondurans tend to rely upon agriculture to make ends meet, and it is exactly this reliance that places them in such a precarious economic situation.⁸ Given these observations, it stands to reason that economic development would be a key priority for the Honduran Government. Indeed, it would be quite difficult to imagine any functional government in the world that would ignore such fiscal dire straits. The resulting question, then, is not whether economic development needs to occur in Honduras. The situation in Honduras, instead, leaves us with two questions: whether laws creating special economic zones (SEZ) like the ZEDE can actually address these economic issues, and whether they can be made to work for the country's Indigenous peoples in such a way that their culture, identity, land rights, and natural resources are protected.

While many other scholars and economists (not mutually exclusive terms) have addressed the former question,⁹ this paper will seek to address the latter, exploring what some of the best practices related to Indigenous governance might look like within the context of a ZEDE regime: 1) Section I will provide a brief historical overview of Indigenous peoples' land rights in Honduras; 2) Section II will explore some of the key provisions of the ZEDE regime, and discuss

³ Victoria Tauli-Corpuz, (Special Rapporteur on the Rights of Indigenous Peoples), *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras*, U.N. Doc A/HRC/3342/Add.2 at 17 (July 21, 2016).

⁴ *Id.*

⁵ ANAYA, *supra* note 1, at 2.

⁶ World Bank, *The World Bank in Honduras* (Feb. 1, 2019, 3:24 PM), <https://www.worldbank.org/en/country/honduras/overview>.

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., Paul Roemer, *Why the World Needs Charter Cities*, YOUTUBE (Feb. 2, 2019, 11:02 AM), <https://www.youtube.com/watch?v=mSHBma0Ithk>.

international comparative approaches that have been implemented in other jurisdictions, including other Indigenous jurisdictions; 3) Section III will seek to outline key criticisms of the ZEDE legislation; 4) Section IV will evaluate contemporary best practices for strengthening Indigenous governance, and explore ways that a ZEDE regime can maintain consistency with international law and international norms with respect to Indigenous peoples.

I. Overview of Indigenous Peoples' Land Rights in Honduras and Latin America

The situation of Indigenous land rights and, indeed, all lands rights in Honduras has long been marked by a government that is better known for its corruption than its competence. Sarah Chayes of the Carnegie Endowment for International Peace has even gone so far as to call the Honduran Government “kleptocratic,” arguing that corruption is simply the *modus operandi* of the country.¹⁰ Naturally, against such a backdrop, it comes as little surprise that Honduras has not historically been a safe haven for Indigenous property and land rights. To provide context regarding the advent of ZEDE regimes, it is first necessary to understand a bit of the history that led to the present state of affairs for Indigenous peoples in Honduras. This section provides a historic overview of Indigenous peoples' land rights, discusses some of the effects of state expropriation, and modern issues related to the lack of title.

A. The Gradual Erosion of Indigenous Land Rights in Honduras

The story of Indigenous people's struggle for land rights, both in Honduras and for Indigenous peoples around the world, really begins in the colonial era. In what would become Honduras, after “discovery” by the Spanish, the Spanish Crown summarily granted land freely to the “conquistadors from 1513 to the early 1620s,” despite the absence of formal mechanisms for regulating the ownership of land.¹¹ The so-called “Indian problem” proved to be endemic to the burgeoning colony, resulting in the Crown's decision to legalize the practice of “repartimiento,” which granted pieces of land in conquered territories to Spanish soldiers, and along with it, the right to enslave and exploit the labor of natives “living on or near the land.”¹² The practice led to the creation of villages, or *pueblos*, throughout the region. The first *pueblo* was established in 1536 at San Pedro de Puerto de Caballos.¹³ As additional villages were established, to its credit, the Crown did seek to implement some protections for Indigenous lands.

¹⁰ SARAH CHAYES, *WHEN CORRUPTION IS THE OPERATING SYSTEM: THE CASE OF HONDURAS* 5 (Carnegie Endowment for Int'l Peace 2017).

¹¹ William S. Stokes, *The Land Laws of Honduras*, 21 *AGRIC. HIST.* 148, 149 (1947).

¹² *Id.* at 149.

¹³ *Id.*

Even the infamous explorer Hernán Cortés suggested that “the Indians of Honduras should be allowed to retain their land and institutions” provided that neither lands nor their systems of governance conflicted with the objectives of the Crown.¹⁴ By 1588, Spain would accede to Cortes’s request, passing legislation that aimed to prevent further “injury or harm” from being done to the Indians, and stipulating that Indian communities that had lost lands should have their lands returned.¹⁵ By some accounts, these colonial-era actions would remain steadfast until Honduras gained its independence from Spain in 1821.¹⁶ Following Independence, Honduras would join the Central American Federal Republic in 1823 after a brief stint as a republic of the First Mexican Empire.¹⁷

B. The “Modern” Era: Lack of Title and State Control

With new governments and independence came new practices. Extreme political volatility in the post-colonial era followed on the heels of comparative quiet during rule by the Spanish. From the Honduran Government led by Francisco Morazán in 1829, through the year 1900, Honduras would be led by some 98 different governments – almost none of them democratically elected.¹⁸ The result of such political instability in Honduras would see the young nation divided into two categories of land tenure: 1) lands protected under a property rights regime that encompassed all of the property rights associated with ownership as understood according to “19th-century liberal form[s] of land tenure”; and 2) lands that were “owned and controlled by the state.”¹⁹ Naturally, for the peasant and Indigenous populations, the results of this system were particularly grim. Many poor Hondurans and Indigenous peoples alike were abruptly reduced to the status of squatters, merely occupying public lands that they had/have held for centuries.²⁰

Given these conditions, land conflicts in Honduras have occurred on a regular basis.²¹ Even when the Honduran Government has made efforts to reform its land registration system to become more accommodating to the needs of rural Hondurans and Indigenous peoples, the outcome has yielded strikingly mixed results. For example, one of the largest land initiatives in Honduran history came about with the adoption of Decree 170 in 1974 during the rule of General

¹⁴ *Id.* at 150.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Brian Trackman, William Fisher & Luis Salas, *The Reform of Property Registration Systems in Honduras: A Status Report* (Jun. 11, 1999), https://cyber.harvard.edu/prs/Hondu.html#N_1_.

¹⁸ *Id.*

¹⁹ Mario Fandino, *Land Titling and Peasant Differentiation in Honduras*, 20 *LATIN AM. PERSP.* 45, 47 (1993).

²⁰ *Id.*

²¹ Eva Thorne, *Land Rights and Garífuna Identity*, 38 *NACLA REP. AMS.* 21 (2004), <https://www.tandfonline.com/doi/pdf/10.1080/10714839.2004.11724510?needAccess=true>.

Oswaldo Lopéz Arellano.²² Under this reform, the Honduran Government limited ownership rights, and implemented strict agricultural production goals.²³ Failure to meet the state-imposed quota could result in expropriation as determined by the newly minted National Agrarian Institute (INA).²⁴ The move was met with predictable outrage from private businesses and foreign companies entrenched in “the Honduran banana and coffee plantations,” thereby undercutting support from investment interests crucial to the Honduran economy.²⁵ As a result the effort “stagnated.”²⁶

In hopes of restarting the reforms, in 1982, the Administration of Roberto Suazo Córdoba would seek to restructure the INA to focus its implementation efforts of Decree 170 on land titling.²⁷ But this too was met with significant logistical challenges. The sheer volume of public lands owned by the state at that time would leave the INA with the Herculean task of titling the lands of Honduran farmers who had lived on the land and cultivated it for generations without any title at all.²⁸ To add perspective, it is worth noting that at the time some 64 percent of registered land in Honduras was considered public lands owned by the state.²⁹ Nevertheless, the effort would prove to be historic in that prior to the Land Titling Program under the Córdoba regime, “basic information about a parcel’s boundaries, location, and value” simply did not exist.³⁰

In more recent years, the Honduran Government has continued to make piecemeal efforts to reform its land tenure system as it relates to Indigenous peoples. One such movement involved efforts by the Miskitu peoples to achieve collective land titling for their traditional lands and territories through the International Labour Organization’s Convention No. 169, and through “World Bank Financed projects,” including the First Land Administration Project in 2004, and the Second Land Administration Project in 2010.³¹ The efforts have seen increased participation from Indigenous and local leaders that resulted in Honduran President Porfirio Lobo Sosa’s decision to “promote intercommunity titling” – a clear nod to the Miskito and Garífuna peoples, and one consistent with

²² Trackman, *supra* note 17.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Fandino, *supra* note 19 at 49.

³⁰ Trackman, *supra* note 17.

³¹ Roman Alvarez, Enrique Pantoja, Gerson Granados & Alain Paz, *Strengthening Indigenous Peoples Land Rights in Honduras: The Miskitu People’s Experience of Collective Land Titling, Lessons Learned and Main Challenges for the Future* (2017), https://www.conftool.com/landandpoverty2017/index.php?page=browseSessions&print=head&form_session=488&presentations=show.

the objectives of ILO 169.³² Even so, progress toward land reform in Honduras has been slow. According to some critiques, the temptation of the state to classify peasant and Indigenous lands as “underutilized” has led both to “exploitative labor regimes” controlled by a wealthy elite, and the “tourism-driven displacement” of Indigenous peoples.³³ Given these challenges, particularly in countries like Honduras, it seems clear that some alternate governance mechanisms would be preferable to an exploitative status quo.

II. Exploring Alternative Approaches to Indigenous Property Rights Under a ZEDE Regime

One alternative approach to the Honduran property rights dilemma that has gained traction in recent years is the creation of a Zones of Economic Development and Employment (ZEDE) within the country. The concept harkens back to the work of economist Paul Romer who is credited with coining the phrase ‘charter cities’ in 2009.³⁴ On its face, the concept is simple: The government allows for the creation of zones within Honduras that are governed by both a charter and the basic constitutional provisions of the Honduran Constitution and Honduran criminal law that guarantees human rights protections.³⁵ In turn, a ZEDE developer has a strong incentive to collaborate with local Hondurans in determining how the zone will be governed.³⁶ But even while the concept is simple, as this section demonstrates, the key provisions of the ZEDE legislation have profound implications for Indigenous land rights, title, and protections against expropriation. Such policy changes, indeed, have the potential to create a space for the recognition of Indigenous land rights that is unprecedented in the modern era. These opportunities for change will be discussed in Section IV below. In addition, the legislation and its implementation also have the opportunity to draw on the experiences of a number of comparative international approaches, only a few of which are outlined here.

A. Overview of the ZEDE Legislation

The general principles of the ZEDE legislation are relatively straightforward. While the preamble provides a lengthy authorization for the creation of the zones, Chapter I, Article I of the ZEDE organic law is more direct in outlining the metes and bounds of the legislation. In particular, the Article

³² *Id.* at 6.

³³ Christopher Loperena, *Settler Violence? Race and Emergent Frontier of Progress in Honduras*, 69 Am. Q. 801, 802-804 (2017).

³⁴ Romer, *supra* note 9.

³⁵ Decreto No. 120-2013, 5 Sep. 2013, La Ley Orgánica de las Zonas de Empleo y Desarrollo Económico (ZEDE) [Zones of Employment and Economic Development Organic Act (ZEDE)], ch. I, art. 3, LA GACETA, DIARIO OFICIAL DE LA REPÚBLICA DE HONDURAS, N. 33,220, Sep. 6, 2013, at A.58.

³⁶ *Id.* ch. I, art. 1, at A.57.

authorizes the zones to “establish their own policies and regulations,” in order to “facilitate the country’s integration into world markets under highly competitive and stable rules.”³⁷ The mandate includes a two-part obligation for a ZEDE regime. Fundamentally, the first objective is to “create jobs,” and accelerate economic development.³⁸ But a second, equally important objective of the legislation is for ZEDE regimes “to provide the population with education services, health, public safety, infrastructure,” and to create “real improvement in the living conditions of Honduras.”³⁹ From the outset, the legislation strikes a markedly different tone than past decrees (See Decree 170 above) and reform efforts. Rather than locus of power being held within the state, the emphasis of the legislation from the outset is that developers and ZEDE regimes themselves must create both jobs and address social inequalities, *and* deliver services to the citizens of Honduras.

Similarly, Article 3 of the legislation builds upon the notion of devolution of power, or decentralization, by investing ZEDE regimes with “functional and administrative autonomy,” including the opportunity to create courts and legal systems that draw from the legal systems or traditions from elsewhere, so long as they are consistent with the Honduran Constitution and its provisions related to the protection of human rights.⁴⁰ Article 4 adds that ZEDE regimes are also granted the power of the purse, enabling them to create budgets, manage taxes, and engage in the process of contracting — all without the need to obtain permission from the Honduran Government.⁴¹

Given such broad grants of authority, it would seem as if ZEDE regimes are given complete *carte blanche* to operate however they would like. But the legislation actually creates a series of robust accountability mechanisms that govern how a ZEDE should operate. The most notable of these is the creation of a Committee for the Adoption of Best Practices (or to use the Spanish acronym, a CAMP).⁴² CAMPs consist of some 21 individuals who possess “recognized integrity, leadership, executive capacity, and international reputation,” and are tasked with oversight of the ZEDE regime.⁴³ The governing arrangement is unique in that it creates opportunities for respected leaders from local Indigenous communities to have a co-equal voice in the administration of the ZEDE, alongside experts and other committee members as appointed by the President.⁴⁴ Far from the era of decrees and centralized processes, ZEDE regimes are

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* ch. I, art. 3, at A.58.

⁴¹ *Id.* ch. I, art. 4, at A.58.

⁴² *Id.* ch. III, sec. I, art. 11, at A.59-60.

⁴³ *Id.*

⁴⁴ *Id.*

structurally created to allow for local governance by individuals who have gained the trust and esteem of community members. Indeed, it is this group of local leaders, rather than bureaucrats from the capital city, that create all of the other mechanisms of governance that follow. From the appointment of a technical secretary who serves as the chief executive officer of the ZEDE,⁴⁵ to external auditing,⁴⁶ to the creation of dispute resolution mechanisms that are subject to international human rights tribunals and standards,⁴⁷ local leadership permeates the entire operation.

Regarding the property rights of landowners falling under the jurisdiction of a ZEDE regime, the legislation provides that a ZEDE must recognize the land rights of owners who have title to real estate within the zone.⁴⁸ This is a remarkable departure from the past practices of the Honduran Government which formerly engaged in the habit of land expropriation over the objections of landowners. The legislation also provides opportunities for property owners to voluntarily incorporate their property into a ZEDE regime.⁴⁹ This is not to say that the Honduran Government has ceded all of its rights to expropriation. Like any nation in the world, Honduras retains the right to expropriate property as an attribute of its national sovereignty. Under ZEDE regimes, it is notable that the legislation requires just compensation for any expropriation of property made in the name of “public utility or necessity.”⁵⁰ While this does not exempt lands from the potential for expropriation, the just compensation mechanism marks a sharp difference from the practice of “repartimiento” during the era of Spanish rule, and the fits and starts of land tenure reform during the modern era of Honduran Governments.

In terms of individual rights and the delivery of services to citizens within a ZEDE regime, Chapter VI of the legislation empowers ZEDE regimes with the authority to create systems of “education, health, social security, and promotion of science,” in addition to obligating them to “guarantee freedom of consciences, religion, labor protection, and freedom of association”⁵¹ as consistent with international law and treaties like the International Labor Organization.⁵² Given this mandate to respect international law, the legislation also makes explicit provisions regarding the rights of Indigenous peoples. ZEDE regimes are obligated to respect the property rights of Indigenous peoples and Afro-descendants, and to seek cooperative development programs subject to the “mutual acceptance” of Indigenous and Afro-descendant peoples.⁵³ When compared to other special economic zones in other international jurisdictions, the

⁴⁵ *Id.* ch. III, sec. II, art. 12, at A.60.

⁴⁶ *Id.* ch. III, sec. III, art. 13, at A.60.

⁴⁷ *Id.* ch. III, sec. IV, art. 14, at A.60-61.

⁴⁸ *Id.* ch. V, art. 24, at A.62.

⁴⁹ *Id.* ch. V, art. 26, at A.62.

⁵⁰ *Id.* ch. V, art. 28, at A.63.

⁵¹ *Id.* ch. VI, art. 33, at A.64.

⁵² *Id.* ch. VI, art. 35, at A.64.

⁵³ *Id.* ch. VI, art. 43, at A.65.

Honduran provisions under Article 43 of the legislation are among the most innovative in the world in protecting the rights of Indigenous peoples.

Given these basic provisions, it is worth noting that the legislation has not been without controversy. Criticisms of the legislation are discussed in Section III below. For now, it is sufficient to note that the Honduran Government has taken great measures to endorse the legislation's constitutionality, including firing four Honduran Supreme Court Judges.⁵⁴ Nevertheless, the concept has been embraced by Honduran presidents and congresses alike, across party lines.⁵⁵ Now that a reconstituted Supreme Court has embraced the law's constitutionality, for whatever controversy that surrounded the legislation, the ZEDE organic law remains the law of the land and set for implementation.

B. Comparative International Approaches

While the Honduran ZEDE legislation creates a number of governance innovations and special protections for Indigenous peoples' rights, it is also briefly worth mentioning that the special economic zones themselves are not unique in the world. The Honduran Government stands to benefit from a number of similar mechanisms in other countries that have provided a template for the creation of ZEDE regimes. This section explores a few examples to provide context to the ZEDE experiment taking place in Honduras.

1. SEZ – China

Boasting the world's second largest economy, China's ascent as an economic world power began some 40 years ago with the adoption of its "Open Door" policy in 1978.⁵⁶ Under its Open Door reforms, China opted to "test the efficacy of market-oriented economic reforms in a controlled environment," indeed, an environment far afield of the centrally-controlled economy of the time.⁵⁷ Such changes, however monumental, were not implemented in an expansive manner. Far from adopting sweeping modifications to the Chinese economy, Beijing sought to implement incremental free-market reforms that fostered competition within China's first Special Economic Zones, or SEZs, in hopes of attracting outside, foreign investment and generating jobs for local citizens.⁵⁸ Under this relatively narrow framework, the SEZs of the Guangdong

⁵⁴ Michael Castle Miller, *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*, 22 WILLAMETTE J. INT'L L. & DISP. RESOL. 271, 281 – 283 (2015).

⁵⁵ *Id.*

⁵⁶ Douglas Zhihua Zeng, *China's Special Economic Zones and Industrial Clusters: Success and Challenges* 1 – 44, 3 (Lincoln Institute of Land Policy, Working Paper No. WP13DZ1, 2012).

⁵⁷ *Id.* at 7.

⁵⁸ *Id.*

and Fujian provinces became the first Chinese polities to implement market friendly policies aimed at facilitating “comprehensive economic development,” within the SEZ, including “financial, investment, and trade privileges.”⁵⁹ Within two years, SEZs were established at Xiamen, Shantou, Shenzhen, and Zhuhai, all cities located along China’s eastern coast.⁶⁰

The main objectives of the SEZs were three-fold: (1) attract foreign direct investment, (2) expand Chinese exports, and (3) accelerate the infusion of new technologies into the economy.⁶¹ Shenzhen, in particular, was considered a highly experimental zone, and was afforded “the greatest freedom to explore innovations.”⁶² While all of the zones demonstrated considerable growth, Shenzhen’s economic output per capita was the “most prominent and comprehensive SEZ,” in China.⁶³ According to the Chinese Government’s own assessment, what ultimately made the Shenzhen SEZ successful was China’s willingness to confer not only direct trade advantages, but also to relax central authority, and grant the SEZ the ability to develop new policies and procedures for the administration of the zone.⁶⁴ The end result was a SEZ where governance functioned at a local level. The zone would eventually adopt an official minimum wage, a social insurance package for contract workers (a first of its kind in China), and employment and social protections for workers.⁶⁵ In addition to the implementation of a plan aimed at structural reform, the SEZ would seek to accommodate new technologies in manufacturing that would significantly increase the number of industrial projects operating within the zone.⁶⁶ The end result would see the Shenzhen SEZ parlay an erstwhile small fishing city into a major economic power in China, one ranked first among all of China’s cities in new patent registrations, and develop a high-tech industry that the country had never before seen.⁶⁷ The spillover effects resulted in the creation of some six SEZs and 14 “open” coastal cities, with the SEZs accounting for 45% of foreign direct investment, 60% of exports, and the creation of over 30 million jobs — all in addition to overcoming the manifold governance challenges posed by rapid increases in urbanization and agricultural and industrial modernization.⁶⁸

⁵⁹ *Id.*

⁶⁰ Yue Man Yeung, Joanna Lee & Gordon Kee, *China’s Special Economic Zones at 30*, 50 EURASIAN GEO. & ECON. 222, 223 (2009).

⁶¹ *Id.* at 224.

⁶² *Id.*

⁶³ *Id.* at 225.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 230.

⁶⁸ Investing in Africa Forum: Partnering to Accelerate Investment, Industrialization, and Results in Africa, *China’s Special Economic Zones*, CHINA DEV. BANK, 2 (2015), <https://www.worldbank.org/content/dam/Worldbank/Event/Africa/Investing%20in%20Africa%20Forum/2015/investing-in-africa-forum-chinas-special-economic-zone.pdf>.

2. Dubai

Similarly, in the United Arab Emirates (UAE), the emirate and city of Dubai has witnessed unprecedented growth following the creation of freezones across the UAE. At least sixteen freezones exist in Dubai alone.⁶⁹ The Dubai freezone regulations allow foreign entities to own businesses within the zone, provide tax incentives to encourage foreign direct investment, and exempt the freezone from broader regulations established by the emirate.⁷⁰ Like the situation in Honduras, the UAE freezones fall under the jurisdiction of a local governance entity, known in Dubai as the FreeZone Authority (FZA).⁷¹ FZA's are tasked with licensing, providing support to business operating within the zone, adopting international best practices in attracting foreign investors, and enacting their own laws and regulations "governing specific areas."⁷²

Such regulatory flexibility has allowed for the creation of FZAs that combine cultural norms with innovative dispute resolution mechanisms, resulting in unique governance structures that have contributed to Dubai's economic boom. Regarding cultural norms, the Dubai International Financial Centre (DIFC), in particular, has sought to incorporate the notion of bargain and negotiation inherent in Islamic culture, and imbed it within a flexible legal-structure design that governs the FZA.⁷³ Under the DIFC's governance structure, the ruler of Dubai sought to create an FZA that was designed with a "legal environment based on British common law," so that the FZA could compete with other "global financial centres," many of which had legal origins that derived from British common law principles.⁷⁴

To create such an innovative dispute resolution mechanism, the FZA brought in top legal talent from around the world, including a number of senior commercial law judges from a variety of common law jurisdictions. The group was tasked with creating a legal structure that could deftly resolve commercial disputes arising from within the DIFC, under the UAE civil code and Shari'ah law.⁷⁵ The result was the creation of a legal system for the DIFC FZA that utilized "world-class legal systems" and applied them "within geographically-bounded free zones."⁷⁶ Because the legal system included key elements of the British commercial law that already governed in key financial centers around the world,

⁶⁹ Valerie Pelton, *Jebel Ali: Open for Business*, 27 *TRANSNAT'L L. & CONTEMP. PROBS.* 375, 376 – 77 (2018).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 379.

⁷³ Michael Strong & Robert Himber, *The Legal Autonomy of The Dubain International Financial Centre: A Strategy for Global Free-Market Reforms*, 29 *INST. OF ECON. AFFAIRS* 36, 37 (2009).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

the system was immediately deemed to be “credible” by decision-makers from other nation-states.⁷⁷ For the DIFC, the outcome was an influx of over “\$18 billion worth of private investment” and the creation of a long-term development strategy that has seen the FZA reap benefits, despite the diminishing contribution of fossil fuels to the nation’s economy.⁷⁸ Moreover, the FZA has helped the UAE to overcome the so-called “legal divide” in the battle against poverty.⁷⁹ While some nations fester in poverty traps resulting from “poor property rights, limited rule of law and little economic freedom,” the DIFC has demonstrated that governance matters.⁸⁰ By creating effective governing institutions that provide “high quality legal systems that support wealth creation and attract investment capital,” the DIFC experiment has changed the conversation about development within the region — in addition to making the FZA experiment an astounding success.⁸¹

3. FTZ – USA

Given the success of special economic zones in China and the Middle East, it is important to observe that the experiment has also been carried out in the United States, which has a long-standing history of promoting free trade dating back to the original “proto-SEZs” of the Colonial Era in settlements like Jamestown and New Amsterdam.⁸² Given its history in overlapping, and often conflicting jurisdictions, the U.S. provides an interesting case study in the potential and challenges posed by the creation of Special Economic Zones.

The origins of SEZs in the U.S. date back to the royal charters of European powers issued by the “potentates of the old world,” during the era of colonization in North America.⁸³ Under these instruments, many of the early European settlements in what would become the U.S. were chartered as “private, for-profit settlements” with a mandate to provide a return on investment for its European bankrollers.⁸⁴ The results were decidedly mixed for the proto-SEZs of the U.S. While some saw eventual success in places like New York, and Boston through the charter of the Massachusetts Bay Company, other locales like the one in Roanoke, and ultimately the Virginia Company of London, failed miserably. Roanoke, in particular, was doomed to report that “all of its settlers [were] either dying or disappearing.”⁸⁵ Unsurprisingly, like the experiments in China and

⁷⁷ *Id.* at 38.

⁷⁸ *Id.* at 40.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Tom Bell, *Special Economic Zones in the United States: From Colonial Charters, to Foreign-Trade Zones, Toward USSEZS*, 64 BUFF. L. REV. 959, 962 (2016).

⁸³ *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. 543, 573 (1823).

⁸⁴ Bell, *supra* note 82, at 978.

⁸⁵ *Id.* at 979.

Dubai, the American experiment with SEZs involved “financial risks” in addition to the challenges of Colonial Era war and disease.⁸⁶

In the modern era of the U.S., in 1993, the Federal Government began to explore options for “special regulatory treatment.”⁸⁷ Taking a grant-based approach, the U.S. Government sought to foster economic development within “distressed communities” providing tax credits, deductions, and investment incentives to spark economic development.⁸⁸ The projects uniformly had little impact — some barely generating a few businesses — while all remained tethered to Washington and its federal red tape.⁸⁹

By contrast, the first foreign-trade zones (FTZ) in the U.S. originated in the New Deal of 1934, which created zones within the country that were exempt from federal customs duties and excise taxes.⁹⁰ Eventually other benefits were added, including the option to have duties assessed on the value of imported materials or the value of finished goods; the option to have an item achieve export status immediately before leaving the U.S. (a benefit for excise tax purposes); and shielding personal property within an FTZ from “state and local ad valorem taxes.”⁹¹ The result of the experiment has seen some 12.5% of all imports in the U.S. pass through FTZs.⁹² FTZs are now located in every state, some 328 total sites as of 2014 — anywhere within sixty miles or a ninety-minute drive of a U.S. Customs and Border Protection (CBP) port of entry.⁹³ Exceptions for FTZ locales can be made if an applicant can provide the appropriate oversight measures as assented to by a local CBP Port Director.⁹⁴ This resulting geographic diversity of U.S. FTZs has seen some 2,700 firms employ roughly 420,000 people in FTZs.⁹⁵

4. Indigenous Examples: Tribal FTZs in the USA

While the movement is nascent, as a recent law review note explains, the movement to create FTZs run by Indigenous peoples on Indigenous land in the U.S. is already well under way.⁹⁶ A deeper analysis of the origins of tribal

⁸⁶ *Id.*

⁸⁷ *Id.* at 980.

⁸⁸ *Id.* at 981.

⁸⁹ *Id.* at 982.

⁹⁰ *Id.*

⁹¹ *Id.* at 983.

⁹² *Id.* at 987.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 987.

⁹⁶ Jacob Laughlin, *Foreign-Trade Zones in Indian Country: Is a Foreign-Trade Zone Right for Your Tribe*, 42 AM. INDIAN. L. REV. 173 (2017).

sovereignty is beyond the scope of this paper.⁹⁷ But it is worth noting that the legal origins of the special, quasi-sovereign status of tribal nations in the U.S. dates back to some of the earliest cases in America's federal Indian law jurisprudence — cases decided not long after the American battle for Independence and the end of the proto-SEZ era. Collectively known as the Marshall Trilogy, the early Indian law cases as penned by Chief Justice John Marshall establishes that Tribes retain aboriginal title to their lands tantamount to a right of occupancy;⁹⁸ that Tribes are domestic dependent nations rather than foreign nations under the Constitution;⁹⁹ and that the U.S. government maintains the exclusive right to regulate Indian affairs to the exclusion of the states.¹⁰⁰

This quasi-sovereign status imbues Tribes with considerable flexibility in creating laws, regulations, and policies within the exterior boundaries of their reservations and/or tribal lands. When considering the creation of Foreign-Trade Zones (FTZs) on tribal lands, businesses would receive all of the attendant benefits of U.S. FTZs noted above, and the additional benefits that fall to businesses located on tribal lands as well. One example involves the exemption of property and business inventory from state and local ad valorem taxes.¹⁰¹ Even under the FTZ-permitting legislation, some personal property and business inventory can be considered taxable property and goods under state and local tax schemes.¹⁰² By contrast, given the special status of Tribes established under the Marshall Trilogy, such taxes simply do not apply to FTZs located within Indian Country as a matter of law.¹⁰³ Similarly, businesses relocating to a tribal FTZ would be exempt from “state and county zoning and land use restrictions.”¹⁰⁴

Given the competitive advantages offered by tribal FTZs, it comes as little surprise that some tribal nations in the U.S. are already engaged in the Indigenous FTZ experiment. The Citizen Potawatomi Nation in Oklahoma, for example, established an FTZ on tribal lands back in 2014.¹⁰⁵ Dubbed the “Iron Horse Industrial Park”— the Citizen Potawatomi Nation has taken steps to revive a formerly defunct railroad line passing through tribal lands to transport products from the industrial park to nearby Union Pacific lines, connecting to Houston, Texas and its major, international seaport.¹⁰⁶ Similar efforts on a smaller scale have been undertaken by the Lumi Nation, the Puyallup Tribe of Washington, and the Oneida Tribe of Wisconsin.¹⁰⁷ Along with the potential to revive

⁹⁷ See generally ROBERT A. WILLIAMS JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (Univ. of Minn. Press 2005).

⁹⁸ See *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

⁹⁹ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹⁰⁰ See *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁰¹ Laughlin, *supra* note 96, at 184.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 185.

¹⁰⁶ *Id.* at 187

¹⁰⁷ *Id.* at 187 – 88.

manufacturing jobs, and the potential to provide a steady employment base sorely needed on a number of Indian reservations, it is safe to speculate the FTZ experiment in Indian Country will continue apace.

III. Critiques and Concerns Regarding the ZEDE Regime

While there are many success stories of special economic zones as discussed above, it is fair to point out that there are a number of skeptics of SEZs and ZEDE regimes in particular. As they relate to matters of Indigenous governance in Honduras, these criticisms tend to fall along four broad categories of critique: (1) questions about security within Honduras and within ZEDE regimes; (2) concerns about perpetuating income inequality and enriching foreign investors at the expense of Hondurans and Indigenous peoples; (3) the potential for ZEDE regimes to weaken and undermine Indigenous governance within a ZEDE regime; and (4) concerns over a perceived lack of recognition of fundamental human rights for Hondurans and Indigenous peoples alike, living and working within a ZEDE regime. This section will provide a brief overview of each argument.

A. Matters of Security: Viability of ZEDE Regimes in the Face of Potential Violence and Political Unrest

Security concerns surrounding the nation of Honduras are well-documented and obvious. Honduras is easily one of the most violent countries on Earth. As the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz notes, the homicide rate in Honduras hovers around 68 per 100,000 people. Perhaps more disturbing is the point that this places those who would seek the rule of law and security at a genuine “increased risk of falling victim to violence.”¹⁰⁸ Similarly, in the case of Indigenous leaders seeking to defend their lands, authorities have recorded multiple instances of murders, assaults, attempted homicides, and increased violence against women.¹⁰⁹ The security situation has led some scholars to question whether corruption is built into the very fabric of Honduran civic institutions.¹¹⁰ Indeed, some violence can be attributed to corruption among the ranks of Honduran law enforcement officers. The Human Rights Watch organization notes that the Special Commission for Police Reform Restructuring, established by Honduran President Juan Orlando Hernández, had removed some 5,000 police officers from the 10,000 cases brought to the commission for evaluation.¹¹¹ Such accounts add fuel

¹⁰⁸ Tauli-Corpuz, *supra* note 3, at 6.

¹⁰⁹ *Id.*

¹¹⁰ CHAYES, *supra* note 10, at 4.

¹¹¹ HUMAN RIGHTS WATCH, HONDURAS: EVENTS OF 2018, <https://www.hrw.org/world-report/2019/country-chapters/honduras> (last visited March 10, 2019).

to the claims that gangs serve as 'police auxiliaries,' and that criminal organizations are both 'organic and intrinsic' to daily operation of public life.¹¹²

Nevertheless, in some ways, political stability is the more complex question in Honduras. The political leadership of Honduras has vacillated between military dictatorship allied with landowners, corrupt regimes, and ultimately democratic reforms that ushered in a presidential election in 1981.¹¹³ Despite economic liberalization efforts in the 1990s, the Honduran Government was ill-equipped to deal with Hurricane Mitch, which reached landfall along the coast, leaving some three million people homeless in its wake.¹¹⁴ The crisis left the Government reeling "to impose public order and prevent looting," ultimately culminating in the suspension of civil liberties and a mandatory curfew by November 3, 1998.¹¹⁵ Before long, foreign aid was being misused and mismanaged, leaving the nation economically wrecked and in crisis-mode.¹¹⁶ The chaos continued into the early 2000s with the election of President Zelaya — who ran on an agenda of criminal reform and an "inclusive exercise of power."¹¹⁷ As reforms gave way to disappointment, a 2008 referendum on constitutional reform painted Zelaya as an autocrat executing a power grab through the referendum process, bringing protestors to the streets.¹¹⁸ Before a deal could be brokered between the political factions, the Honduran military stormed the presidential palace, leading Zelaya out in handcuffs in the wee-hours of June 28, 2009.¹¹⁹ Subsequently, an interim President was appointed, and by the end of November, President Porfirio Lobo was sworn into office.¹²⁰

Given the ebb and flow of the modern era of Honduran politics, the political climate in Honduras, and indeed in much of Latin America, seems far from stable. For many dissidents, it is anathema to even consider private-sector development like a ZEDE regime without first resolving the political questions that surround the Government's operation at the highest levels. Similar questions beset the security structure that would surround a ZEDE given the Honduran penchant for corruption among law enforcement officers, and the inability of the Government to reform its police force. To state the matter succinctly, "police officials at every level consistently serve on behalf of . . . the networks [public-sector elites, private-sector elites, and organized crime]. They rarely seem to work in the interests of the ordinary population."¹²¹ If law enforcement is not to be trusted, and the Government of Honduras is deemed to be highly unstable, it remains to be seen how these structural governance challenges are rectified by

¹¹² CHAYES, *supra* note 10, at 8.

¹¹³ *Id.* at 10.

¹¹⁴ *Id.* at 11.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 12.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 13.

¹²⁰ *Id.*

¹²¹ *Id.* at 27.

ZEDE regimes that are formed at the pleasure of the current, presumptively corrupt Government.

B. Income Inequality: Creating New Elites at the Expense of Indigenous Peoples

While security concerns in Honduras primarily relate to events and machinations outside of a potential ZEDE regime, arguments related to income inequality stem from concerns about the governance of the regimes themselves. Such critiques are admittedly in the abstract since no ZEDE regime has yet been established in Honduras. Nevertheless, numerous watchdogs and U.N. entities have weighed in based on perceptions that the ZEDE legislation might widen the income inequality gap that presently besets Honduras.

The most succinct of these arguments is made by the U.N. Special Rapporteur on the Rights of Indigenous Peoples. In her 2016 report, the Rapporteur expresses concern about investment projects promoted by the Honduran Government and claims by Indigenous peoples that their rights had been infringed that followed.¹²² With regards to energy projects, of main concern to the Special Rapporteur was the fact that many Indigenous peoples were not consulted on a number of renewable energy projects, including hydroelectric and wind projects. According to the Special Rapporteur's findings, while 40 such contracts were approved by the legislature for renewable energy projects, some 21 contracts would affect Indigenous peoples, none of whom had been consulted as required under the Honduran-ratified, international law instruments: ILO Convention No. 169, and the U.N. Declaration on the Rights of Indigenous Peoples.¹²³ The Special Rapporteur also raised concerns about various dam projects taking place throughout the country, almost wholly without consulting the Indigenous peoples of Honduras.¹²⁴

While it may come as somewhat of a surprise that renewable energy projects would be the critical target of a U.N. human rights report, the Special Rapporteur was equally critical of the Honduran Government for its treatment of Indigenous peoples rights related to extractive industries, large-scale agricultural, tourism and infrastructure projects (ZEDes). Regarding extractive industries (primarily mining, but some natural gas exploration contracts were also at issue), the concerns of the Special Rapporteur primarily stemmed from mining concessions that were made by the Government without prior consultation.¹²⁵ Regarding agriculture, the Special Rapporteur expressed concern that a number of "agro-industrial projects" had been promoted by powerful development players in

¹²² Tauli-Corpuz, *supra* note 3, at 11.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 12.

the nation and had resulted in the destruction of houses and crops by individuals seeking to plant oil palms on Indigenous lands.¹²⁶ Regarding the creation of ZEDEs in particular, the Special Rapporteur expressed concern about the potential for the forced displacement of Indigenous communities, the lack of consultation with Indigenous peoples, and plans to proceed with displacement schemes despite the opposition of the communities.¹²⁷

The concerns expressed by the Special Rapporteur regarding Indigenous consultation, displacement, poverty and violence have been pithily summarized through the notion of “Development as Imperialism,” as described by Dr. Tim MacNeill in the journal *Humanity and Society*.¹²⁸ Fundamentally, the development as imperialism framework poses a simple question: “in whose interest has [a development project] been prepared?”¹²⁹ The answer to this question differentiates development from imperialism, and utterly depends upon “the way in which [a development project] is carried out.”¹³⁰ The author argues that development implies a “true community-benefitting” endeavor that generates a better quality of life for people and that protects natural resources.¹³¹ Imperialism, by contrast, allows the “economically powerful to assert their dominance through control of political institutions, economies, and resources in the interest of capital accumulation through the dispossession of local populations.”¹³² While the outcomes vary, development as imperialism is primarily speculative, occurs across jurisdictional levels (local, national, international/transnational), and tends to benefit “national and transnational capitalist classes and the general logic of neoliberalism.”¹³³

Having established the framework above, the concerns about development within a ZEDE regime, as expressed by the Special Rapporteur’s report on Indigenous consultation, are readily explained. Under the development as imperialism paradigm, Indigenous peoples are poised to have their lands taken, their human rights ignored, and their labor exploited all for the benefit of foreign direct investors who have zero interest in the Indigenous peoples and their traditional lands where the ZEDEs will be located. A lack of Indigenous consultation is consistent with the imperialism-as-development framework in that it both fails to benefit the community and allows the economically powerful to assert control over a region despite the deafening silence of Indigenous peoples in the consultation process (or lack thereof). The fact that the investors are national and transnational only adds strength to the argument that the benefits of such a

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Tim MacNeill, *Development as Imperialism: Power and the Perpetuation of Poverty in Afro-Indigenous Communities of Coastal Honduras*, 41 HUMAN. & SOC’Y 209 (2017).

¹²⁹ *Id.* at 211.

¹³⁰ *Id.*

¹³¹ *Id.* at 211 – 12.

¹³² *Id.* at 213.

¹³³ *Id.*

regime will flow to the “capitalist classes” rather than the Indigenous peoples being exploited.¹³⁴

C. Undermining Indigenous Governance Institutions

A related critique to that of income inequality comes from legal and anthropological circles. While income inequality focused on the potential for economic disparities to increase and generate adverse economic impacts for Indigenous communities, Anthropologist Kerri Vacanti Brondo argues in a recent article that the consequences of ZEDE regimes, and development generally, are poised to facilitate a process of “erasure” of Indigenous peoples from their traditional territories and ultimately their traditional governing institutions.¹³⁵

The article draws heavily from the example of the Garifuna people, traditionally located along the Honduran coastline, following their “deportation to present-day Honduras from St. Vincent by the British in the late eighteenth century.”¹³⁶ While the Garifuna, for the most part, originally lacked title to their lands, the relative isolation of beachfront communities ensconced within collectively-owned territories allowed the Garifuna to maintain a unique language, religion, kinship structure and subsistence agricultural practices in spite of their initial deportation.¹³⁷ In other words, their traditional governance structure and communal approach to property rights allowed the Garifuna to thrive. Moreover, Garifuna culture also maintained its own form of Indigenous customary law whereby the Garifuna people held “territorial resources in common,” made land-use decisions in common, and passed down agricultural lands to future generations only through the matrilineal line and with the consent of the community government.¹³⁸

Given the many land title reform efforts of the Honduran government, the result of such a community-based system is predictable. Prior to the 1990s, the Garifuna lacked formal title to their lands and possessed only a right of occupancy.¹³⁹ A mere right of occupancy was a far cry from the full right of ownership. Before long, continued encroachments by third-parties eventually led to the “communal land titling program” of the 1990s.¹⁴⁰ While the idea of imbuing Indigenous communities with the full rights of title seemed to be well-intentioned, its execution created a variety of problems for the Garifuna. First, the

¹³⁴ *Id.*

¹³⁵ Kerri Vacanti Brondo, “A Dot on a Map”: *Cartographies of Erasure in Garifuna Territory*, 41 *POLAR: POL. & LEGAL ANTHROPOLOGY REV.* 185 (2018).

¹³⁶ *Id.* at 186.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 187.

titles did not include ancestral territory.¹⁴¹ In addition, some Garifuna were so keen to obtain title that they readily agreed to cede “significant portions of their land in exchange for titles.”¹⁴² Even where communities made informed decisions based on promises of the Government to develop ceded land into infrastructure projects that could benefit the community, there were no enforcement mechanisms to see such promises carried to fruition.¹⁴³

The end result of all of these various titling schemes deployed by the Honduran government, according to Brondo, was the gradual erasure of the Garifuna from the literal map of Honduras, and the figurative map of Honduran civic life.¹⁴⁴ In some ways, this is a difficult conclusion to dispute. With Garifuna lands effectively erased from their control, and their traditional customary law and governance structures in a state of fundamental distress, the Garifuna would seem to embody a textbook example of what can happen when there is no respect for local, Indigenous self-governance. That such processes ignored international law and the Honduran Constitution would only add a hollow victory for the Garifuna. In losing their lands and governance structures, it would seem that they had already lost the war for cultural survival.

D. Lack of Recognition of Fundamental Human Rights

Ultimately the critiques above suggest that the Honduran government is thoroughly incapable of protecting the fundamental rights of Hondurans and Indigenous peoples alike. On this point, a 2014 report from the National Lawyers Guild (NLG) is instructive.¹⁴⁵ While the report did not focus on the situation of Indigenous peoples, the concerns raised about ZEDEs provide a backdrop for understanding the organization’s criticism of the ZEDE regime concept as it relates to the protection of human rights.

Many of the arguments put forward by the NLG have been discussed already, but the report has an interesting section outlining alleged violations of international law that the implementation of ZEDE regimes would bring about. First, the organization argues that the ZEDE law would “strip hundreds of thousands of Hondurans of their right to self-determination, as well as their corresponding right to participate in government.”¹⁴⁶ The NLG argument follows that because ZEDEs are administered by a Technical Secretary appointed by a Committee for the Adoption of Best Practices (CAMP), the limitations under the statute restrict the ability of ZEDE residents to select their leadership serving on

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 197.

¹⁴⁵ NAT’L LAWYERS GUILD, REPORT OF THE NATIONAL LAWYERS GUILD DELEGATION INVESTIGATION OF ZONES FOR ECONOMIC DEVELOPMENT AND EMPLOYMENT IN HONDURAS 1 (2014), https://www.nlginternational.org/report/Final_NLG_ZEDE_Report.pdf.

¹⁴⁶ *Id.* at 20.

this key governing body.¹⁴⁷ While residents of a ZEDE can propose Technical Secretaries, the CAMP is not obliged under the law to act on the residents' proposed candidate, and in rural areas only the ZEDE organizers can propose a Technical Secretary to the CABP.¹⁴⁸ In turn, a Technical Secretary maintains considerable power within a ZEDE and can enact legislation for the ZEDE while also managing its governance.¹⁴⁹ The NLG similarly notes that ZEDEs have broad authority to tax lands and create internal security structures (police, criminal justice systems, etc.), despite ZEDE inhabitants having little say over the zone's operation.¹⁵⁰

Regarding fundamental human rights generally, the NLG essentially draws upon many of the themes already covered in this section including land title, an absence of consultation, and the potential complicity of foreign businesses in human rights abuses. Regarding property rights, the NLG takes issue with the compensation mechanisms for landowners whose lands are seized by a ZEDE, noting that generations of Hondurans, including Indigenous peoples, do not have legal title to their lands.¹⁵¹ In the event a ZEDE was to take such titleless lands for its own purposes, the ZEDE legislation would not require that compensation be paid to the landowners whose lands were taken.¹⁵² The NLG was also careful to underscore that the human rights guarantees of Indigenous peoples under international law instruments ILO 169 and the U.N. Declaration on the Rights of Indigenous Peoples, provide for property rights protections that are not reflected in the ZEDE legislation.¹⁵³ Like the Special Rapporteur, the NLG noted that Indigenous peoples had simply not been consulted during the legislative process, despite the fact that the ZEDEs could have direct and significant impacts upon Indigenous communities.¹⁵⁴ Finally, the NLG warns potential businesses participating in ZEDE regimes that they could "become complicit in the human rights violations committed by the Honduran state, and possibly commit or aid and abet additional human rights violations themselves."¹⁵⁵

While the NLG arguments are not necessarily new, they are important in that they reframe many of the issues covered by scholars under an international human rights framework buttressed by international law and the norms set by the international community. The question that results is whether the concerns

¹⁴⁷ *Id.* at 21.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 22.

¹⁵¹ *Id.* at 23.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 25.

expressed in this section (regarding security, income inequality, weakened Indigenous governance institutions, and a lack of recognition of fundamental human rights) amount to an intractable outcome that is endemic to the ZEDE legislation, or whether the perceived shortcomings of the ZEDE legislation can be overcome.

IV. Opportunities and Aspirations: Making the ZEDE Legislation Work for Indigenous Peoples

To be sure, the critiques above pose a number of difficult questions for proponents of ZEDE regimes to consider. The fundamental human rights of Hondurans and Indigenous peoples are too important to ignore the pressing issues raised by ZEDE critics. Perhaps the most compelling advice for ZEDE developers to consider comes from Tim MacNeill's blistering critique in his piece detailing how development gives way to imperialism.¹⁵⁶ Even while drawing distinctions between development that benefits communities and development that benefits a small elite, MacNeill's point of moderation is that whether a project is beneficial or imperialistic entirely depends upon "the way in which it is carried out."¹⁵⁷ This final section will attempt to explore options for implementing ZEDE regimes that allow them to work for Indigenous peoples by taking into account protecting Indigenous property rights, strengthening Indigenous governance, implementing best practices for land registry, and guaranteeing Indigenous peoples' rights within a ZEDE regime as required under international law.

A. Indigenous Property Rights: Benefits of Title and Ownership

As discussed in several critiques above, the status of Indigenous property rights tends to be at the forefront of concerns relayed by human rights organizations and scholars. While the legislation provides that a ZEDE must recognize the land rights of owners who have title to real estate within the zone,¹⁵⁸ it places no restrictions on the ability of a ZEDE regime to expropriate property within a zone, so long as just compensation for any expropriation of property is made in the name of "public utility or necessity."¹⁵⁹ To be fair, the new legislation is a marked departure from past practices of the Honduran Government, but it does not account for the collective ownership traditions of many Indigenous Hondurans, and it does not account for the equity problem presented by Indigenous peoples' lack of title to lands within a ZEDE.

¹⁵⁶ MacNeill, *supra* note 128, at 211.

¹⁵⁷ *Id.*

¹⁵⁸ Decreto No. 120-2013, 5 Sep. 2013, La Ley Orgánica de las Zonas de Empleo y Desarrollo Económico (ZEDE) [Zones of Employment and Economic Development Organic Act (ZEDE)], ch. V, art. 24, LA GACETA, DIARIO OFICIAL DE LA REPÚBLICA DE HONDURAS, N. 33,220, Sep. 6, 2013, at A.62.

¹⁵⁹ *Id.* ch. V, art. 28, at A.63.

Similarly, one of the most consistent criticisms levied against ZEDE regimes, and one artfully developed by the National Lawyers Guild, is the fact that ZEDE regimes wield considerable power within the zone.¹⁶⁰ According to the NLG, the Technical Secretary and the CAMP can enact legislation for the ZEDE (via the CAMP) while also managing its governance (via the Technical Secretary), and that the resulting broad authority conferred upon ZEDEs under the legislation even allows them to create internal policies (including lands taxes) and internal security structures to boot.¹⁶¹ In the NLG's view this makes ZEDE regimes a dangerous gambit for the people of Honduras.

In some ways, the NLG's view is overstated. The ZEDE Organic Law does not grant CAMP and the organizers of a ZEDE limitless *carte blanche*. In addition to the various rights guarantees already discussed, Article 5 of the Organic Law mandates that a ZEDE "must create the appropriate economic and legal environment" for it to become a center of national and international investment.¹⁶² This obligation would be very difficult for ZEDE developers to achieve if they administered a ZEDE regime as a tyranny. Such a governance structure would be particularly hard-pressed to attract foreign investors given the potential for unsettled expectations in leaving their investments subject to the whims of an all-powerful entity.

To the contrary, the Organic Law actually provides ZEDE regimes with a powerful self-interest in adopting internal policies and governance structures that include stable institutions and international governance best practices, so as to become centers of national and international investment. Indeed, the legislation strongly encourages and authorizes the adoption of international best practices for exactly this reason. The relevant portion of the legislation reads, "They (ZEDes) are authorized to adopt through their domestic legislation the international best practices suitable to attract domestic and international investment and the best national and international talent and to establish their own civil service system based on meritocracy."¹⁶³

While the standard for "international best practices" may seem broad, it is important to note that the term does place a limiting factor on the types of governance structures that may be adopted. Far from authorizing the establishment of tyranny within a ZEDE regime, the law implies that a ZEDE should establish governance institutions that draw from the best practices as recommended by the international community and as defined under international law instruments. As will be discussed below, for Indigenous peoples' rights these best practices tend to provide more robust protections than the domestic laws of many countries. Moreover, given the goal of outside investment, it is also worth

¹⁶⁰ NAT'L LAWYERS GUILD, *supra* note 145, at 22.

¹⁶¹ *Id.*

¹⁶² ZEDE, ch. 1, art. 5, at A.58 (Hond.).

¹⁶³ *Id.*

noting that the legislation does not limit the governance structure of a ZEDE to the metes and bounds of authority outlined in the Organic Law. Depending upon the national and international profile a ZEDE regime wields, it is possible and perhaps likely that ZEDEs will adopt supplementary governance structures that emulate traditional checks and balances in order to bolster investment confidence within the zone.

In sum, the fact that a ZEDE's ultimate governance structure is not entirely mapped out from the beginning of the process does not present an unusual risk. In every country where special economic zones have been created, the movement has always begun as a gambit. There were certainly no guarantees of governance or economic success when the SEZs in China were founded, or when the FZAs were established in Dubai. Even the experiment of the Citizen Potawatomie Nation of Oklahoma was and is far from assured success. However, the *sine qua non* of success has always been in furnishing special economic zones like a ZEDE with a wide space for governance innovations. The result of such latitude is that the structures created can protect the rights of both individuals and communities located within a zone based upon a ZEDE regime's self-interest in successful governance.

As the matter relates to Indigenous property rights, it is helpful to draw some foundational guidance from one of Latin America's premier scholars, Hernando De Soto. In *The Mystery of Capital*, De Soto underscores why a functioning property right's system is crucially important for economic success. In De Soto's view, "dead capital" exists when there is no system for converting physical assets into capital. A simplistic example is "using your house to borrow money to finance an enterprise."¹⁶⁴ To achieve even these basic objectives, De Soto explains that the "relevant economic features of assets" are recorded only through "the records and titles that formal property systems provide."¹⁶⁵ In other words, unless there is a formal property system in place, there is no mechanism for the creation of capital.¹⁶⁶ To bring the question back to Indigenous peoples' property rights, the idea behind the Honduran Government's many fits and starts in creating a communal land titling regime for Indigenous peoples is actually not off base. Property rights are an essential prerequisite to the creation of capital, and a part of the property rights system requires developing titling processes in order to record the ownership of land.

Considering the work of De Soto and the critique of the NLG, one clear alternative is to develop a property rights regime that respects the property rights of Indigenous peoples by recognizing the communal ownership of lands based on the historic relationships that tie an Indigenous community to its ancestral lands. Because the blank canvass of authority conferred upon ZEDEs through the legislation is so broad, ZEDE developers have the opportunity to lay to rest

¹⁶⁴ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 40 (Basic Books 2000).

¹⁶⁵ *Id.* at 46.

¹⁶⁶ *Id.* at 47.

criticisms of exploitation, expropriation, and abuses of powers by constructing systems that recognize Indigenous ownership claims within the ZEDE boundaries.

Consider also that the risks and rewards of the ZEDE cannot be fairly assessed against a vision of perfect governance that does not exist nor has never existed in Honduras. ZEDE regimes must be assessed against the reality and status quo of intractable corruption and abuse of power that appears immune to national-level reform in Honduras. Creating a space for a controlled experiment in governance has worked to reform authoritarian regimes around the world; there is no reason to believe it cannot work in Honduras. At the very least, the outcome of the experiment for Indigenous peoples' land rights cannot be worse than the Honduran status quo. Indeed, the regimes hold at least some promise of delivering Indigenous justice and land rights that have been too long delayed.

B. Strengthening Local Indigenous Governance: Creating Indigenous Controlled Institutions Within a ZEDE Regime

Similarly, Brondo cast a skeptical eye toward ZEDE regimes, musing in broad terms about the erasure of the Garifuna from both the literal map of Honduras and the figurative map of Honduran civic life.¹⁶⁷ With Garifuna lands increasingly out of their control, and their customary laws and governance structures in varying stages of social decay, the situation does not seem encouraging given Brondo's analysis. But is this really the end of the conversation? While it is true that ZEDEs wield considerable authority within their zones, as noted above, a blank canvas of authority creates space for, in this case, Indigenous governance innovations.

Functionally, as noted in section one, Indigenous communities could be represented co-equally in the administration of a ZEDE alongside experts and other committee members as appointed by the President.¹⁶⁸ In this case, the broad authority given to ZEDE regimes could actually benefit Indigenous peoples by allowing for the creation of local governance entities that respect Indigenous peoples rights and local governance traditions within a ZEDE regime while also enabling Indigenous peoples to provide counsel, whether through representation on the CAMP or perhaps even in the Technical Secretariat.

Regarding the best practices for creating Indigenous governance structures that are responsive to the needs of Indigenous peoples, lessons gleaned from over twenty years of research on Indigenous governance at the Native Nations Institute (NNI) and the Harvard Project on American Indian Economic Development (HPAIED) are instructive.¹⁶⁹ As outlined by NNI researchers, there are five key

¹⁶⁷ Vacanti Brondo, *supra* note 135, at 197.

¹⁶⁸ ZEDE, ch. 3, art. 11, at A.59 (Hond.).

¹⁶⁹ In the interest of full disclosure, I should note that while the research of my colleagues is on point and relevant to this discussion, I do not and cannot claim their endorsement of the argument I make here with respect to ZEDE regimes.

characteristics of Indigenous governance that ZEDE developers should consider when aiming to position Indigenous peoples for collective success.¹⁷⁰ First, Indigenous peoples should take steps to collectively assert decision making power.¹⁷¹ As it relates to ZEDE regimes, this suggests that Indigenous peoples should be key players as the ZEDE development process moves forward and as decisions are made that will directly affect Indigenous communities within the zone.

Second, Indigenous peoples must “back up Indigenous control with effective governing institutions.”¹⁷² This key principle suggests that Indigenous people within a ZEDE should be permitted to either maintain or revive the Indigenous governance structures that were mainstays of their culture and community. This point seems particularly relevant to the Garifuna as discussed by Brondo above. Even so, governing institutions are crucial for Indigenous peoples because they “represent agreement among society’s members about how collective, community life should be organized.”¹⁷³

Third, regardless of what Indigenous governing institutions are created, it is crucial that they match the culture of the Indigenous peoples.¹⁷⁴ When institutions are a good fit for the culture of an Indigenous community, this adds legitimacy to the governance entities because they are consistent “with deeply held community principles and beliefs about authority...that can meet contemporary needs.”¹⁷⁵ In the case of a ZEDE regime, the culture of Indigenous peoples could play a key role in reversing the trends of cultural erasure, and in helping to ensure that the ZEDE development process is informed by the culture of Indigenous peoples in the region.

Fourth, Indigenous peoples tend to thrive as a collective when they engage in the process of strategic decision-making.¹⁷⁶ While it is true that all of these principles apply to Indigenous communities, in most respects, this principle falls squarely on Indigenous peoples to implement. In the ZEDE context, it requires a degree of trust on the part of Indigenous peoples to think strategically and to create “long-term objectives, identify priorities and concerns,” and evaluate the assets and constraints facing the community under a ZEDE regime – particularly when there have been so many false starts that have occurred along the way in Indigenous dealings with both governments and foreign investors.¹⁷⁷

Finally, Indigenous peoples must have leaders who are “nation-builders and mobilizers.”¹⁷⁸ In the U.S. context, Indigenous peoples are said to be Native

¹⁷⁰ REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 18 (Miriam Jorgensen ed., Univ. of Ariz. Press 2007).

¹⁷¹ *Id.* at 19.

¹⁷² *Id.* at 22.

¹⁷³ *Id.* at 23.

¹⁷⁴ *Id.* at 24.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 25.

¹⁷⁷ *Id.* at 26.

¹⁷⁸ *Id.*

Nations, hence the term nation-building. In Honduras, Indigenous people may not be nations in the same way that Tribes in the U.S. are, and ZEDEs surely do not serve the same function as the reservation system in the U.S., but the common thread between the two is that in both contexts effective leaders put an emphasis on the “development and enhanced community welfare,” rather than on the mere distribution of resources.¹⁷⁹

In sum, while Brondo’s concern for Indigenous cultural erasure is an important issue for many Indigenous peoples in Honduras, the Indigenous governance principles outlined here can serve as a useful guide as ZEDE developers seek to engage Indigenous communities within their areas of jurisdiction, and as they seek to create governance entities that meaningfully include them in the administration of the ZEDE.

C. Best Practices in Land Registry and Reform

The problem of piecemeal land registry reform has been a consistent theme in this discussion about ZEDE regimes. As multiple critics note, efforts by the Honduran Government to both recognize collective land title and develop a meaningful property rights system generally as it relates to subsistence or small-scale landowners have either been inept or simply beyond the ability of the national Government to deliver. One interesting approach comes from the work of Pablo Bandeira, et. al. and their piece that seeks to evaluate land administration systems with an eye toward applications in Peru and Honduras.¹⁸⁰ In Honduras, the scholars developed a methodology for assessing aspects of the national land registry that could be improved according to international standards.¹⁸¹ One point mentioned in the Honduran context is that land registration is not compulsory.¹⁸² Such a system invites a litany of challenges, not the least of which includes the structural challenges involved with property rights and title identified by De Soto above. Similarly, the scholars noted that in Honduras a key challenge facing the land administration systems was the titling process.¹⁸³ The scholars identified the expense of the titling process as being a key obstacle toward a successful land administration system. In the Honduran system, they recommend cutting the costs of titling so that the benefits of assured ownership and transferability were greater than the costs to register lands. The solution of lowering registry costs to boost the benefits of ownership and transferability sound obvious given the experience of Indigenous peoples in Honduras, but until such steps are taken it is difficult to

¹⁷⁹ *Id.*

¹⁸⁰ Pablo Bandeira, Jose Maria Sumpsi & Cesar Falconi, *Evaluating land administration systems: A comparative method with an application to Peru and Honduras*, 27 LAND USE POL’Y 351 (2010).

¹⁸¹ *Id.* at 352.

¹⁸² *Id.* at 354.

¹⁸³ *Id.* at 359.

know how significant an impact the costs of the process have had on the broader land registry system.

An additional movement along the path toward land registry best practices involves a new framework for land titling that recognizes Indigenous peoples' collective land rights.¹⁸⁴ Drawing from the example of the Miskito people, who traditionally inhabited large areas consisting of several communities with fluid boundaries, Indigenous peoples who are similarly situated are said to live in "Inter-Community Land titling" arrangements.¹⁸⁵ Using ILO Convention 169 as a foundation, and given that the Honduran Government had already incorporated some of the Conventions principles into domestic law, the Miskito sought funding from a variety of sources over a number of years, ultimately resulting in the collective title "La Muskitia" in 2012.¹⁸⁶ Such an endeavor fits perfectly within the broad reform authority granted to a ZEDE. For this reason, the case study provides useful insights into the types of creative governance mechanisms that Indigenous peoples are apt to seek, as well as insights into the creative solutions that a ZEDE regime designed for integration and coexistence with indigenous peoples should be willing to entertain.

D. Guaranteeing Indigenous Peoples' Fundamental Human Rights Under International Law

Any discussion of Indigenous peoples' rights under a ZEDE regime must include an overview of the relevant instruments that define the obligations of ZEDE developers in guaranteeing the fundamental human rights of Indigenous peoples – both under international law and ultimately within the boundaries of a ZEDE regime. According to the Special Rapporteur's report, and in the NLG commentary, one of the most important issues for ZEDE developers is prior consultation with Indigenous peoples. Historically, there has been a great deal of tension between national governments and Indigenous peoples and international investors and Indigenous peoples in seeking to launch development projects within Indigenous territories. Despite the historic mishandling of consultation efforts by the Honduran Government, ZEDEs themselves can actually benefit from implementing consultation norms at the beginning of a project in order to facilitate their dealings with Indigenous peoples.

On this score, the work of Spanish scholar Bartolomé Clavero provides a useful overview of reasons that entities should consider Indigenous consultation processes.¹⁸⁷ First, Clavero points out that the U.N. Declaration on the Rights of Indigenous Peoples (then in draft form) provides several articles encouraging a free prior and informed consent "as a manifestation of self-determination."¹⁸⁸ For

¹⁸⁴ Alvarez, et. al., *supra* note 31.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 5.

¹⁸⁷ Bartolomé Clavero, *Indigenous Peoples Rights of Participation and International Development Policies*, 22 ARIZ. J. OF INT'L COMP. L. 41, 42 (2005).

¹⁸⁸ *Id.*

Clavero, the term brings with it significant heft, empowering Indigenous peoples to either engage the consultation process or not.¹⁸⁹ Second, Clavero argues that in addition to the Declaration, legally binding instruments such as ILO Convention No. 169 requires consultation as a function of its mandate to foster Indigenous participation.¹⁹⁰ In Clavero's view, the origins of this call to consultation with Indigenous peoples is not as robust as that found under the Declaration. Because the prescriptive nature of ILO 169 does not provide Indigenous peoples with a right *not* to participate in the consultation process, to Clavero, it cannot be said that Indigenous peoples have a real opportunity to exercise self-determination.¹⁹¹ Under this view, real consultation occurs when Indigenous peoples have the right to leave the negotiations. Given the importance of these two instruments within the broader framework of Indigenous peoples' rights, each one will be discussed in turn.

1. The United Nations Declaration on the Rights of Indigenous Peoples

Clavero's piece is important in that it identifies key articles of the Declaration that are relevant to the topic of consultation as raised in concerns by the Special Rapporteur and others. Article 19 of the Declaration notes that "States shall consult and cooperate in good faith with Indigenous peoples" such that their "free prior and informed consent can be obtained," in the adoption of any legislative or administrative measures affecting them.¹⁹² In first point of fact, U.N. Declarations are not binding, but their norms have a tendency to set international policy in relevant areas. Here, the Declaration encourages states to pursue consultation with Indigenous peoples as a reflection of the normative view of the international community. So while the article may not be binding, it is surely instructive. As it relates to ZEDEs, assuming that an opportunity for consultation has not already passed, developers could be wise to consider consultation as a demonstration of "good faith" under the article and as an outward demonstration of a ZEDE's commitment to international norms as they relate to Indigenous peoples. In the event that the consultation window has closed (in Honduras, one of the criticisms of the ZEDE organic legislation is that it was passed without the government obtaining the free, prior and informed consent of Indigenous peoples¹⁹³), consultation would still be a useful venture if only to demonstrate a serious commitment to respecting Indigenous peoples' rights going forward.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 45.

¹⁹¹ *Id.* at 46.

¹⁹² ANAYA, *supra* note 1, at 327.

¹⁹³ *See generally* Tauli-Corpuz, *supra* note 3.

While Clavero's work establishes a good faith, if not a moral obligation for would-be developers to engage in the consultative process with Indigenous peoples, it does not directly address the procedural mechanics for how to actually engage in consultation in fulfillment of the Declaration's call for "free, prior and informed consent" (FPIC)¹⁹⁴ In an effort to address a number of frequently asked questions and to outline best practices with respect to the Declaration's FPIC mandate, the U.N. Department of Economic and Social Affairs under the auspices of the Food and Agriculture Organization released a document giving a step-by-step detail for how developers can pursue the FPIC principles of the Declaration in partnership with Indigenous peoples. Key points are summarized below.

i. When is FPIC required?

This question is perhaps the most straightforward to address in the context of a ZEDE regime. According to the U.N., FPIC is required before the "approval and/or commencement of any project that may affect the lands, territories and resources that Indigenous peoples customarily own, occupy or otherwise use in view of their collective rights" to self-determination, lands, territories, and properties.¹⁹⁵ Given the transformative potential that a ZEDE envisions, it is safe to say that implementing a ZEDE regime in any lands should always involve serious consideration of the FPIC process. Such consideration should involve a conscious evaluation of the applicability of the FPIC process in relation to the facts of a particular ZEDE project, keeping in mind that corruption exists and bad faith claims can be made. With respect to verifiable claims that are made in good faith, the benefits of seeking consent largely outweigh the costs of initiating the consultative processes. By engaging in the FPIC principle early, developers have the opportunity to understand from first-hand accounts what the needs and priorities of a community are. Such knowledge can minimize risks that might beset a ZEDE regime and can aid in the process of developing trust between external developers and local Indigenous groups that would allow a project to proceed with the good will of local communities.

ii. What triggers consultation and when should consultation begin?

The U.N. advises that the FPIC process should begin "before any project, plan or action takes place,"¹⁹⁶ such that Indigenous peoples who have verifiable and good faith claims to protection under FPIC are involved "at all stages of development," and "in every facet of development work."¹⁹⁷ In the context of a

¹⁹⁴ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 10 (Sept. 13, 2007).

¹⁹⁵ FOOD AND AGRIC. ORG. OF THE U.N., FREE PRIOR AND INFORMED CONSENT: AN INDIGENOUS PEOPLES' RIGHT AND A GOOD PRACTICE FOR LOCAL COMMUNITIES, MANUAL FOR PROJECT PRACTITIONERS 1, 17 (2016).

¹⁹⁶ *Id.* at 15.

¹⁹⁷ *Id.* at 14.

ZEDE regime that is set for development on lands traditionally occupied by Indigenous peoples, the triggering event for seeking consent should be before commencement of on-the-ground development of a ZEDE regime. Under this principle, developers should seek consent from Indigenous peoples regarding a project “sufficiently in advance of any authorization or commencement of activities at the early stages of development or investment plan, and not only when the need arises to obtain approval from the community.”¹⁹⁸ The point is not to view the FPIC framework as a perfunctory box to check on a long list of implementation to-dos, but to engage Indigenous peoples before they are affected by the project.¹⁹⁹ This includes providing Indigenous peoples with information about a project prior to the initiation of an activity such that Indigenous rights-holders can “analyze, and evaluate the activities under consideration in accordance with their own customs.”²⁰⁰

iii. With whom should developers consult/engage in the FPIC framework?

In the case of a multiethnic nation like Honduras with manifold groups of Indigenous peoples and overlapping claims to territories, understanding the appropriate individuals to approach at the beginning of the consultation process can be a daunting challenge. The U.N. guidance references a seven-step process for identifying the appropriate Indigenous peoples concerned and their representatives. Under step one of the process the U.N. guidance broadly recommends “using diverse sources of information,” including self-governance entities, community organizations, confederations, local councils, local universities, NGOs, and even national censuses.²⁰¹ Developers should cast a wide net in obtaining information about local Indigenous populations and err on the side of inclusion rather than omission. The identified entities would all likely have worked with Indigenous peoples in the region where a project has been planned and could provide a starting point for beginning consultations.

As an extension of step one, the guidance recommends conducting interviews around the project area based on recommendations obtained in step one.²⁰² The goal in this phase of identification is to gather data that will help apprise developers of Indigenous peoples’ “language, customs, land use patterns, and their rights regarding the territory.”²⁰³ Such community conversations can also provide insight into the Indigenous peoples’ concerns or questions regarding

¹⁹⁸ *Id.* at 15.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 20.

²⁰² *Id.*

²⁰³ *Id.*

development. Step three suggests accounting for migrant communities or Indigenous groups that may use a particular territory only seasonally.²⁰⁴ While this recommendation may be less obvious in Honduras, it is a useful reminder that Indigenous groups may have usufructuary rights and arrangements decided amongst themselves that provide for seasonal use of lands and territories.

Additional steps in the guidance's identification phase include tips for beginning the conversation. The U.N. recommends developers approach Indigenous peoples' governance structures where applicable, explain who they represent and the nature of the project – including a timeline overview of the project – research local laws related to free, prior and informed consent, and suggest the encouragement of broad participation.²⁰⁵ While the first three recommendations seem to be fairly obvious, the last point can seem counterintuitive. One of the objectives of consultation would suggest that developers consult with appropriate parties to the exclusion of parties that do not have a direct interest in the consultation. But the broader point that the guidance suggests is that there may be logistical challenges to identifying the appropriate groups, such as individuals who might be disabled, women who are juggling both work and home obligations, youth who can provide insight but might attend school outside of the communities, and also Indigenous peoples who may be migrant workers. These groups are key to the consent process, but including them in the consultation process may require effort by project developers. In sum, the guidance suggests that casting a wide net in the identification phase can aid the consent process by ensuring that all appropriate parties are included from the beginning.

iv. How does consultation work?

Assuming the parties have been identified successfully, the U.N. identifies three steps for best practices in moving the consultation process forward. Based on the preliminary identification conversations noted above, step two of the guidance suggests undertaking a participatory mapping effort to better understand “where Indigenous peoples live, what their land and natural resources are and what usage they have, and what their customary rights are.”²⁰⁶ A key rationale of the mapping project is to determine which community members are appropriate to engage as the consultation process moves forward. This winnowing function serves both the interests of the developer and the Indigenous communities by helping to ensure leadership structures are respected and appropriate parties have a seat at the discussions. Even so, mapping requires careful attention to detail so “all communities affected” are equally involved in the mapping process.²⁰⁷ Based on the information obtained in the mapping, it should become clear what concerns

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 21.

²⁰⁷ *Id.* at 22.

Indigenous peoples have regarding the project (the guidance calls these “non-negotiables”), including sacred sites, “burial areas, archaeological and historical sites, or areas where medicinal plants are harvested.”²⁰⁸ The identification of these elements within a ZEDE provide developers with context for creating legal frameworks that respect Indigenous peoples’ rights to customary and spiritual practices.

Step three of the U.N. guidance and best practices envisions creating a “communication plan” with the parties remaining after step two. The plan should ensure transparency in communications and allow for broad participation that keeps Indigenous communities informed.²⁰⁹ In turn, the plan should allow for “iterative discussion,” repeating the same discussion several times with relevant stakeholders in various communities to provide timely updates on the project.²¹⁰ This includes making available relevant materials and documenting proceedings so Indigenous peoples and their representatives can have access to what was discussed in previous meetings.²¹¹

The purpose of the meetings, per step four, is to eventually arrive at consent.²¹² Having hosted several conversations about the project under step three, step four invites project developers to consider customary methods of decision-making to allow Indigenous peoples ample time to provide consent. Such methods can include votes, ceremonies, and other processes, but the objective is to receive agreement by consensus of the relevant parties.²¹³ The guidance also notes that this is the moment in the consultation phase to solicit feedback and to identify any additional concerns. In the event there is disagreement or opposition to portions of a project, these aspects can be clarified, and conditions can be set for reaching consent.²¹⁴ Assuming consent is achieved, the guidance suggests utilizing whatever binding practice the Indigenous communities recommend to formalize the agreement, and including in the agreement a summary of the project, future communication arrangements, dispute resolution processes, and methods for monitoring the implementation of the agreement within the overall project.²¹⁵ Careful attention should be paid to language barriers within the drafting process and to the various customs and traditions for agreement ratification.

²⁰⁸ *Id.* at 23.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 24.

²¹¹ *Id.*

²¹² *Id.* at 25.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 26.

v. *What happens after the consultation process?*

Step five of the guidance on best practices is essentially a checklist for implementing the agreement monitoring strategy identified in step four.²¹⁶ The goal at this phase of the consultation is to keep Indigenous peoples engaged in the process and to ensure that all parties feel that the process is effective.²¹⁷ Step six includes a wrap up of the process – an after-action report of sorts – that documents the lessons learned from the engagement and outlines how to maintain “trust-based relationship[s],” going forward.²¹⁸ In the context of a ZEDE regime, this aspect is quite important, although it may seem perfunctory. Under the organic legislation creating the CAMPs, local support is desirable but also important if governance structures are to be effective.²¹⁹

In sum, the U.N. guidance on best practices outlines a detailed process that can be useful to project developers seeking to implement a ZEDE regime. It is particularly helpful in providing suggested processes for external investors seeking to engage with local Indigenous peoples, in that it underscores clear steps that are consistent with international norms and international law. Granted, the steps detailed above will likely be different from those envisioned by ZEDE developers at the outset. Given the breadth of Indigenous peoples’ rights contained in the Declaration, the guidance constitutes a reasonable path forward that respects the Declaration’s mandate for free, prior and informed consent for Indigenous peoples. With this guidance in mind, the ZEDE regime presents a unique and innovative opportunity to establish justice systems, protect rights and create economic prosperity – assuming that its rule of law framework provides for the resolution of disputes and for clear and impartial adjudications.

2. International Labor Organization, Convention No. 169 (ILO 169)

Finally, under ILO 169, Clavero points out that under Article 6 (a) governments shall consult the “peoples concerned, through appropriate procedures...whenever consideration is being given to legislative or administrative measures that may affect them.”²²⁰ In contrast to the Declaration, ILO 169 is considered to be a binding instrument. The presumption is that states will adhere to the articles as a matter of international law and as a matter of observing their binding obligations in the world community. Given that the nation of Honduras is an ILO 169 signatory, the consultation mechanisms required under the convention would apply to ZEDE developers. Even on this score, the U.N.

²¹⁶ *Id.* at 29.

²¹⁷ *Id.*

²¹⁸ *Id.* at 30.

²¹⁹ Decreto No. 120-2013, 5 Sep. 2013, La Ley Orgánica de las Zonas de Empleo y Desarrollo Económico (ZEDE) [Zones of Employment and Economic Development Organic Act (ZEDE)], ch. III, art. 11, LA GACETA, DIARIO OFICIAL DE LA REPÚBLICA DE HONDURAS, N. 33,220, Sep. 6, 2013, at A.60.

²²⁰ Clavero, *supra* note 187, at 45.

best practices detailed above would still be relevant to would-be developers in that they are consistent with international norms and provide a clear path forward in implementing the consultation process. Undertaking some form of consultation involving the best practices detailed above would also demonstrate considerable good faith to the Indigenous peoples that could be affected by a ZEDE regime. In contrast to the NLG's suggestion that a developer might be subject to human rights abuses, ZEDE has the potential to be at the vanguard of Indigenous development by taking proactive steps to consult with and engage Indigenous peoples, simply because it is the right thing to do.

E. Further Aspirations: Indigenous Peoples & ZEDE Regime Creation

While the preceding discussion details the obligations of non-Indigenous developers in adhering to international law norms with respect to Indigenous peoples under a ZEDE regime, it is important to conclude this section of analysis on how the ZEDE legislation can work for Indigenous peoples. This is by noting that Indigenous peoples can also leverage the ZEDE structure to gain the autonomy and right guarantees that they have long sought. There are no constraints within the ZEDE regime legislation that would hinder or prevent Indigenous peoples from establishing a ZEDE regime of their own. Indeed, for those Indigenous communities interested in the creation of a ZEDE regime, the framework has the potential to afford Indigenous peoples even greater rights to culture and community than those currently protected by the Honduran Constitution.

The analysis of section two, note that Chapter I, Article I of the ZEDE organic law charges ZEDE zones to “establish their own policies and regulations” to “facilitate the country’s integration into world markets under highly competitive and stable rules.”²²¹ The mandate to create jobs and accelerate economic development places no limitations on the types of groups, Indigenous or non-Indigenous, who are eligible to undertake the venture, provided that they deliver the basic services of education, health, public safety, and infrastructure for citizens in hopes of improving the living conditions within Honduras.²²²

As noted, Article 3 of the legislation imbues ZEDE regimes with the “operational and administrative autonomy” to create courts and legal systems that draw from the legal systems or traditions from elsewhere, as long as they are consistent with the Honduran Constitution and its provisions related to the protection of human rights.²²³ For Indigenous peoples, this presents a unique opportunity – one that exists in few jurisdictions in the world – to formalize their traditional dispute resolution mechanisms. Related, Article 4 vests ZEDE regimes

²²¹ ZEDE, ch. I, art. 1, at A.57 (Hond.).

²²² *Id.*

²²³ *Id.* ch. I, art. 3, at A.58.

with the power of the purse in creating budgets, managing taxes, and engaging in contracting – all without the need to obtain permission from the Honduran Government.²²⁴ Should Indigenous peoples opt to develop a ZEDE regime, this type of governing authority would easily place them at the vanguard of Indigenous governance innovation in the world.

Even where the ZEDE legislation is prescriptive in creating a national Committee for the Adoption of Best Practices (CAMP) overseeing all ZEDE regimes, a ZEDE regime's interaction with the CAMP – as interpreted by the existing committee – is limited to the initial approval of governance institutions and legal system. In this manner, local governance would remain a decidedly Indigenous governance that operates with meaningful authority within the regime, that formalizes Indigenous institutions and that creates Indigenous systems which respect the land rights of Indigenous peoples within the zone.²²⁵ Such a system would also grant a significant degree of self-determination for Indigenous peoples, greater than those currently granted to Indigenous peoples under Honduran law.

An additional benefit of Indigenous peoples taking the lead in creating ZEDE regimes is that the legislation provides for flexibility in collaborating with foreign direct investors. In the event that Indigenous peoples lack the technical capacity to develop business strategies and long-term business modeling, external investors and partners can supplement an Indigenous-led ZEDE regime with the technical expertise necessary to make the venture successful – expertise that would remain under the guidance of Indigenous communities and in such a way that their priorities are advanced. As earlier sections of this discussion note, several Tribes within the U.S. system have already successfully created and implemented FTZs. This suggests that the Indigenous peoples of Honduras, too, can leverage the structures and provisions of the legislation to their cultural and economic benefit – on their own terms.

In the event that Indigenous peoples in Honduras were apt to pursue such an aspirational enterprise, the lessons learned in Honduras could serve as a model for other jurisdictions and Indigenous peoples around the world to consider. In most respects, the costs of exploring opportunities within a ZEDE regime would remain relatively low for Indigenous peoples, while the potential gains, incumbent upon success, stand to be fairly high. In sum, for the Indigenous peoples of Honduras, ZEDE regimes present an opportunity to strike a meaningful balance between Indigenous autonomy and the assertion of historical rights, and the collaborative efforts of external partners to achieve the goals of the legislation in creating opportunities for accelerating economic development – all within the confines of a national government that has already agreed and provided space for such enterprises to succeed.

²²⁴ *Id.* ch. I, art. 4, at A.58.

²²⁵ *Id.* ch. V, art. 24, at A.62.

V. Conclusion

The preceding discussion attempted to provide an introduction to the ZEDE regime by introducing the situation of Indigenous people's land rights in Honduras. This discussion was followed by an overview of the ZEDE legislation itself and comparative special economic zone examples in hopes of situating the Honduran ZEDE experiment amid other special economic zones in the world. The paper then considered critiques of the ZEDE legislation before exploring alternative approaches that might make the legislation work for Indigenous peoples. Despite this lengthy conversation, the simple answer to the question, "will the ZEDE regimes work for Indigenous peoples," is that it depends. To borrow a line from MacNeil, the success of the ZEDE endeavor depends upon the intent and will of the developer, engagement in the process by Indigenous peoples, and the manner in which a ZEDE regime is implemented. The structural attributes of the legislation are sufficiently broad, as demonstrated in section four, such that there is nothing inherent to the legislation that would undermine Indigenous rights as a matter of course. Further research will be eminently desirable once a ZEDE regime has actually been implemented in Honduras, and its implementation process documented for broader analysis.