

ECUADOR'S FOREST PARTNERS PROGRAM:

An overview of Socio Bosque Contracts with Indigenous Communities

Executive Summary

December 2011

INTRODUCTION

The Ecuadorian Ministry of Environment (MAE) reports that Ecuador loses 200,000 hectares of native forest to deforestation every year. In an effort to slow this steady loss, the Ecuadorian government launched a new program in 2008 entitled Socio Bosque, or “Forest Partners.” The program consists of providing “economic incentives for farmers and indigenous communities who voluntarily commit to the conservation and protection of native forests, moors, and other forms of natural vegetation.”¹ This program, overseen by the MAE, aims to protect 4 million hectares of land and to include 1 million participants. Though Socio Bosque has seen rapid growth in participation and amount of protected land since 2008, many concerns have been raised regarding the implementation of the current program and its future incorporation within a United Nations Convention on Climate Change (UNFCCC) REDD (Reducing Emissions from Deforestation and Forest Degradation) mechanism.

In light of the rapid expansion of Socio Bosque and the accompanying concerns, this report provides an initial legal analysis of the program’s implementation in its current form and the possible implications for collective rights in the short and long term for those involved. More specifically, there are three primary objectives of this study:

1. Create awareness among decision makers, program participants, and the general public about the content, methodology, and implications of Socio Bosque as implemented by the Ecuadorian State;
2. To be used as a tool to facilitate the enforcement and protection of collective rights in possible socio-environmental conflicts in the context of Socio Bosque; and
3. To identify the potential implications of the inclusion of Socio Bosque as a part of REDD with regard to the rights of indigenous communities in the Ecuadorian Amazon.

In 2010 and 2011, Amazon Watch conducted several research activities to carry out this study, including: i) information gathering about Socio Bosque legislation, regulations, and contracts; ii) legal analyses of collective rights of the Socio Bosque agreements signed by the indigenous Amazonian communities; iii) field visits and interviews with officials and members of the communities under analysis; and iv) interviews with state officials, indigenous leaders, and

¹ <http://www.ambiente.gob.ec/?q=node/1064>

interested environmental organizations. Research was also conducted at State-run workshops dedicated to studying the program; diverse opinions from individuals who attended were heard and are presented throughout the report.

THE PROGRAM

The Socio Bosque Program is directed at property owners of land that contains native forests and other natural vegetation. To apply for the program, the following legal documents are required:

1. Legal proof of representation of the community or indigenous nationality.
2. Copy of government issued taxpayer registry number.
3. Current bank account information.
4. Copy of identification of legal representative.
5. Certified copy of the legal status of the community or nationality accredited by the corresponding authority.
6. Copy of land title as inscribed in the government Property Registry.
7. Map of the proposed area of conservation inside the territory or property.
8. Agreement of consent from the community (authorized by the organization secretary, original or copy).

After this paperwork is approved, the MAE sends inspectors to the property in question to determine the priority level for inclusion into the program based on the following combination of ecosystem service value, threat level, and poverty criteria:

1. Areas relevant for the generation of environmental services (biodiversity refuge, hydrologic cycle regulation, and carbon capture): 10 points.
2. Areas of high deforestation risk: 9 points.
3. Areas of high level of poverty: 3 points.

The formula is: Priority Level = Threat Level + Environmental Services + Poverty

Once established, area boundaries are defined and a price per hectare is established based upon the amount land incorporated into the program.

The landowner must then submit a series of additional documents, such as bank certificates and an investment plan for the to-be received funds. Approval of this documentation qualifies the land to be part of a signed agreement.

The agreement extends for a minimum of 20 years after signing, during which time the owners, now “partners,” receive an annual sum of money dependent upon the ecological valuation per hectare, the number of hectares placed in the program, and the compliance with a specified list of obligations for the conservation and protection of ecosystems found on their land. Additionally, partners must submit an investment plan in a format specified by the Ministry and subject to the MAE’s approval and annual monitoring. Upon breach of any obligations, there are stipulated penalties for non-compliant partners.

The MAE states that during the first year of implementation of Socio Bosque (from September 2008 to December 2009), there were 413 signed conservation agreements, encompassing a total of 416,509 hectares and the participation of 40,273 people. As of June 2, 2011, 837,491 hectares of land have been preserved, involving 67,000 people in the program and nearly 1,200-

signed conservation agreements. Amazonian forests make up an overwhelming majority of hectares in the program at 77%, followed by the Sierra at 13%, and the pacific coast at 11%. Nearly all the indigenous nations of the Amazon region have signed, including the Shuar, Kichwa, Sapara, Cofan, Siona, and Shiwiar, as well as the Chachi of the coast, and several Afro-Ecuadorian and Montubio communities.

The implications of Socio Bosque’s methods, however, have raised concerns as to the structure of the program itself and the endangerment of the rights of those involved.

THE SOCIO BOSQUE CONTRACT

The first point of concern regards the type of contract used, in this case, an adhesion contract. This kind of contract requires the interested party to approve and sign the entire contract “as is” in order to join the program and receive the benefits. This eliminates the ability of prospective partners to negotiate portions of the Socio Bosque contract they deem unfavorable, or to treat different types of landholders uniquely. Under the program, an individual farmer holding several hectares signs the same contract as an indigenous nationality holding collective land title to thousands of hectares.

The Clauses

The contract itself, once signed, binds the Ministry of the Environment and the signatory communities, nationalities, or individuals to a series of responsibilities and obligations laid out in fourteen different clauses. All have varying degrees of rights implications, but the most salient are as follows:

Clause 3: Obligations of the parties: This clause delineates the different responsibilities of the community/landowner and the MAE as per the table below:

Ministry of the Environment (MAE)	Executor (community/landowner)
Carry out transfers of funds.	Strictly protect and conserve the area.
Carry out project follow through and monitoring.	No logging.
Provide assistance on any related issue.	No controlled burning.
	No change in soil use.
	No intensive ranching.
	No activities that affect the natural performance of the land or reduce carbon storage.
	No commercial hunting.
	Inform the MAE about any transferring of ownership.
	Prevent fires.
	Permit MAE access.
	Identify and mark the area.
	Provide required information.
	Provide investment plan.
	Comply with the investment plan.
	Report any unforeseen events.

Clause Four: Duration: This clause defines the duration of the contract. As stipulated, the contract is for twenty years, and automatically renews for another twenty years if notice to cancel is not given in the final year of the first contract period.

Clause 5. Incentive: The amount of financial compensation that communities or landowners will receive per hectare is based on the point system for ecological service described above, combined with the number of hectares included in the program as described in the table below. Clause 5 establishes this annual compensation, which ranges from \$30 per hectare to \$.50.

According to the Socio Bosque Operating Manual, the incentive should be cost effective and structured so that it maximizes the number of hectares of ecological value that qualify for the program. Hence, the greater the number of hectares placed in the program, the lower the price per hectare that is paid, as shown in the table below.

Category	Limits (Ha.)		Value / Ha. (USD)
1	1	50	30.00
2	51	100	20.00
3	101	500	10.00
4	501	5,000	5.00
5	5,001	10,000	2.00
6	10,000		.50

Clause 6. Monitoring: With this clause, the MAE establishes its right to carry out on site inspections of the area within the program at any time. It gives MAE the authority to survey the area using remote sensors, aerial photographs, or other technology available to verify the community’s compliance with its obligations. It also requires that each year, the community representative or individual provide a sworn affidavit affirming that the area under conservation remains in the same condition as when entered into the project. Additionally, the community or individual must provide a financial report on the use of the compensation given by the MAE, and provide a narrative report that demonstrates the funds were put to “good use” and progress was made on the proposed activities as per the investment plan approved by the MAE.

Clause 7. Suspension of compensation: With Clause 7, the contract begins establishing the different penalties for non-compliance, the first being a temporary suspension of payment to communities or landowners for a quarter in case of violations related to obligations 7-14 listed under Clause 3, and 8.1 and 8.2 of the Operating Manuel (which is essentially the same list as Clause 3).

Clause 8. Restitution: The eighth clause provides the grounds for termination of the contract between the MAE and executor. Termination can occur in the following four instances:

- More than three temporary suspensions;
- Violation of obligations 1,2,3,4,5 and 15 listed in Clause 3;
- Early termination by the executor, previously authorized by the MAE; and
- Unilateral decision of the MAE.

If a contract is terminated, communities or landowners are liable for a percentage of the funds received depending upon how many years the executor participated in the program, as established in the following table.

Category	Duration in the project	Percentage penalty to be repaid to the MAE
1	1 to 5 years	Restitution 100%
2	6 to 10 years	Restitution 75%
3	11 to 15 years	Restitution 50%
4	16 to 20 years	Restitution 25%

Clause 9. Information: The executor declares that the information provided as established in the requirements as of the signing of the contract and confirmed with the Operating Manual, are legitimate and without alteration. The executor also accepts that if any information is false, adulterated, or erroneous, the MAE reserves the right to unilaterally terminate the contract.

Clause 10. Damages: Here the MAE establishes its right to bring legal actions—administrative, civil, and penal—against the community or landowner in the case of damages incurred by the Ecuadorian state if the executor violates its obligations in the program.

Clause 11. Special obligations: In the case that the executor unilaterally transfers land title or mortgage of lands that include the area under conservation in the Socio Bosque program, this clause guarantees the continuation of the area under conservation with any new owner or creditor. Otherwise, it is considered early termination and the executor is subject to the restitution payments as outlined in Clause 8.

Clause 12. Applicable law: The executor is bound by all applicable law, regulations, and agreements included in the Constitution of the Republic of Ecuador, the Forestry Law and Law of Conservation of Natural Areas and Wildlife, the Secondary Environmental Law, current Ministerial Agreements, and any other future provisions enacted or emitted by the MAE.

Clause 13. Dispute Mechanism: In the case that disputes arise related to the implementation of the contract, both parties will seek to resolve the issue “directly”. Though this term is not defined, it is assumed to imply an effort towards a “friendly solution” without involving a third party. However, if the dispute cannot be resolved, the parties will submit to the following procedure:

- Mediation before the Mediation Center of the Attorney General, or
- The community/landowner submits itself to the state judicial system in Quito, waiving its right to local jurisdiction and judicial process.

Applicable Legislation Governing Socio Bosque Contracts

Ecuador’s 2008 constitution recognized for the first time anywhere, the rights of nature—an unprecedented legal advance that turns Mother Nature and its ecosystems into a rights bearing entity. As well, the Constitution also establishes that development follow the principle of *sumak kawsay*, or ‘living well’ (buen vivir), the indigenous concept that involves the enjoyment of rights in harmony with the community and nature.

Within this framework, Article 74 establishes that people, communities, indigenous groups and nationalities shall have the right to benefit from the environment and its natural riches that allow for *sumak kawsay*. The same Article also establishes that environmental services are not subject to appropriation, and their production, lending, use, and development shall be regulated by the State. Based on this, the Ecuadorian government can generate programs that administer environmental services related to forests, biodiversity, water, or carbon.

The Constitution also includes biodiversity, water, and genetic heritage among sectors of strategic importance. This designation gives the State the right to administer, regulate, control, and develop these resources, in addition to having exclusive decision making power and control over them. It also establishes that “the State can delegate the participation in strategic sectors and public services to mixed public/private companies in which it has the majority share.” The State can also, uncontested, delegate the exercise of these activities to private industry where permitted by law.

Ecuador’s Law of Public Security affirms that the strategic resources established in the Constitution are subject to special regulation, directly impacting the geographic spaces where the resources are contained, the service and activities that they provide and produce, and the public and private companies that may management them. Article 43 of this Law establishes that military protection of installations or infrastructure under circumstances of insecurity that put the management of the strategic resources by private or public companies in danger. According to one expert, the problem with these types of projects is that when a new commodity is created, it also carries with it the need to control and vigilance of the territory that contains said commodity.

Additionally, Clause 12 subjects the contracts to various existing applicable laws, but also keeps the door open to any new unilateral regulation that the MAE emits in the future. These could be related to a changing in the regulatory framework in order to receive financing for a REDD or REDD+ mechanism (which is already underway within the MAE), and/or entrance into the international carbon market.

SOCIO BOSQUE AND COLLECTIVE RIGHTS

Ecuador’s new constitution of 2008 establishes two fundamental additions to the collective rights of indigenous peoples and communities. The first recognizes the pluri-nationality of the Ecuadorian State, or the co-existence of different nations with distinct cultures, traditions, and above all, distinct forms of social structures and relationship with nature. The second enshrines the right of social participation. The Constitution also recognizes, in addition to the explicit rights guarantees contained therein, the rights of indigenous communities and nationalities as contained in “pacts, agreements, declarations, and other international instruments of human rights.”

We analyze the impact of Socio Bosque on three specific collective rights: territorial rights and self-determination, the right to participation, and *buen vivir*, or living well.

Territorial Rights and Self Determination

In examining the question of whether Socio Bosque puts territorial rights at risk, the report looks at three levels included in the constitution: property, possession, and use (usufruct, administration, and conservation). For the first two, there is no evidence to date of massive forced evictions of Socio Bosque members. Thus, these rights do not appear to have been affected, as indigenous communities have generally conserved the land and maintained possession of their territory. However, evictions of individual landowners or individual families has been reported, and isolated cases of indigenous individuals who have been relocated from their farms when they were found to be in the demarcation of the area under conservation. But along these lines, if individual rights have been affected, this could occur on a larger scale throughout the life of the program.

The implications of use, lease, administration, and conservation are more complicated. All are subject to severe restriction under obligations established by the MAE, though it is the communities who decide how much territory to place under conservation. Nevertheless, the restrictions exist. In addition, Clause 11 restricts the unilateral selling, transfer, or mortgaging of lands without assuring the continuation of the new owner in the program. Otherwise, the Socio Bosque member is subject to the penalties of an early contract termination.

According to the constitution, indigenous communities and nationalities have the right to conserve and promote their management practices related to biodiversity and the environment, and the State will establish and execute programs with community participation to assure conservation occurs. This lays the constitutional basis for the Socio Bosque program. However, the possibility of financing from an international carbon market and REDD mechanism could complicate these constitutional guarantees, with new interested actors bringing pressure upon the territorial rights of communities, and causing socio-environmental conflicts that will surely negatively impact the program.

As well, presence and permanent control of state officials represents a change to traditional practices of biodiversity and environmental management. Similarly, receiving an annual sum for conservation represent an important change—both positive and negative—for communities. While they now have more financial resources, this also generates conflict related to this new income.

Other serious questions remain with respect to the sovereignty and autonomy over their lands if an indigenous community becomes indebted to the State for failing to comply with its obligations while having already spent its compensation.

Right to Participation

The 2008 Constitution includes this critical right as one of its ‘transversal rights’ that are applicable to all other guarantees contained therein. It redefines the relationship between the State and democracy, and is a result of collective civil society efforts to exert their rights over the years. Socio Bosque’s Operating Manual requires a process of participation in order to apply for the program and for the signing the contract. An Act of Approval is required from the maximum authority of the community or nationality to apply, and an Act of Mutual Consent of the community in order to join the program. However, in practice, these are no guarantees that the process of obtaining them was in fact, participatory. Various examples exist where assemblies have been controversial or have ended in disputes between members of the community and the leadership, particularly related to financing, quorum, information, etc.

Hence, it is a legitimate question whether the process established by the MAE is adequate or whether it needs to be revised.

An Act of Approval is also required for the investment plan of MAE funds. While such an investment plan approved by base communities might ensure that a leader does not improperly spend funds, it does raise the question what the limit of government intervention is in approving (or not) how an indigenous community uses certain income. That said, the process so far has a fairly high level of acceptance of Socio Bosque member communities who participated in this survey except for a few exceptions.

But a fundamental part of the right to participation relates to access to adequate information that allows for one to truly exert this right. Socio Bosque must ensure that each and everyone member of a communities with whom a contract is signed is duly informed, in their native language, of not only the benefits of the program, but also of the possible negative impacts that it could have. There are a number of clauses in the agreement that are not clear, including for the leaders who have signed them. From the interviews and survey carried out it is clear that the information provided by the Socio Bosque program is not sufficient to achieve an understanding of the legal implications of the contract for communities, related to the early termination, special obligations, applicable legal norms, etc. This is exponentially multiplied with respect to the carbon market and REDD.

The possible repercussions for sovereignty and territorial rights with the introduction of third parties with an entrance into the carbon market presents new challenges and threats to autonomy of indigenous groups, as well as to the sovereignty of the Ecuadorian state. There is still much to be defined, i.e. if REDD would be carried out on a national or sub national level, how to resolve the issue of leakage, what will be the role of the government, the relationship between possible negotiators and external intermediaries with communities, the percentages of the financial take of the parties, the conflict resolution mechanism, etc.

If the Ecuadorian government wants Socio Bosque to be financed by some future REDD mechanism and an international carbon market, it should carry out a process of free, prior, and informed consultation directed at obtaining the consent of the communities who are participating in the program. Otherwise, the decision is unconstitutional.

Sumak Kawsay

Given the indivisibility and interdependence of human rights, the Socio Bosque program is directly related to the resources and sustenance of a community, and will have direct repercussions (positive or negative) in the enjoyment of *sumak kawsay* rights, and the direct increase or decrease in levels of satisfaction of health, housing, education, water, and food of the participating populations is undeniable.

The community participants in this study recognize that the financial incentive of the program has contributed to an improvement in the quality of life of its members via an investment in certain areas. What is not yet clear is whether the positive aspects of the program (incentive and investment) outweigh the negative aspects such as dependence and subordination to the State, the restriction of traditional activities, and internal community conflicts, among others, that could occur.

One of the most frequent complaints of the communities in the program is related to price per hectare of the payment. Communities are unsatisfied with existing price scale, and are pushing for more money, and feel they are discriminated against compared to individual landowners that receive a better per hectare price, while owning less land. Most indigenous communities receive between 1 and 5 dollars per hectare per year, for large extensions of land that has been conserved for millennia, and now they receive the lowest price.

With much of the funds provided by the MAE to communities destined for conservation activities such as zonification, signage, maintenance, infrastructure, and payment for park guards and rangers, it raises the questions whether, in effect, the community members are in fact working for the State and a different type of labor relationship and rights scenario should apply.

While MAE has signaled that if the financing of Socio Bosque changes via REDD and/or the carbon market that the majority of the benefits would go to owners of the forest or direct beneficiaries, the ultimate decision on distribution will occur through regulation of environmental services as stipulated in Art. 74 of the Constitution.

The other major worry among the communities interviewed in the survey in relation to the exercise of *sumak kawsay* rights is related to the possible exploration and exploitation of natural resources in areas where Socio Bosque agreements are in effect. In a grave conflict of contradictory public policy, areas included in the Socio Bosque program are not excluded from non-renewable resource extraction. The possibility of causing major damage to ecosystems supposedly protected by the program due to a decision from a higher level government agency, with no type of repercussion for the MAE as part of the contract, has generated a broad range of criticism and accusations that the program is lacking in seriousness. Along the same lines, some communities have expressed a feeling of defenselessness in the face of incompletion by the MAE in the case that an extractive project is carried out.

SOCIO BOSQUE + ECUADOR'S REDD STRATEGY

In need of additional, non-domestic funds to continue the Socio Bosque program, Ecuador's Ministry of Environment has pursued a strategy to prepare the country to participate in a REDD mechanism. The MAE began sharing information with 35 community leaders in July 2010 about a potential change in financing to Socio Bosque that could come from a variety of sources—multilateral, bilateral, private sector, or via a REDD+ mechanism that could involve carbon markets. The German bank KfW has provided an initial \$12.5 million in funding for reforestation programs and Socio Bosque, as the MAE works to harmonize Socio Bosque's goals with that of REDD+.

In 2010, MAE sought funding directly from the UN-REDD program but was denied after a letter surfaced from the Amazon regional indigenous confederation CONFENAIE denouncing MAE's attempted consultation on Ecuador's national REDD strategy via an internet survey. The letter cited various rights violations related to the survey, where indigenous peoples were given a five-day period to respond in a medium little accessible to them. In 2011, after some improvements to the consultation process, the MAE received \$4 million from UN-REDD.

In the case of Socio Bosque areas are incorporated into a REDD+ mechanism, a possible option that MAE is considering is the establishment of a trust fund to "assure the financial sustainability

of the Socio Bosque program.” What is unclear is whether this will result in an increase in the financial incentives received by participants in the program.

While the transition to REDD is a major strategy and priority for the MAE, the process of information sharing and consultation has just begun.

KEY FINDINGS:

- Socio Bosque has seen rapid growth since 2008, including 837,491 hectares of preserved land, 67,000 partners, and nearly 1,200 signed conservation agreements.
- The program has generated significant interest among indigenous communities in the country, evidenced by the fact that 89% of the area under conservation is community or collective lands, and in great majority belonging to indigenous groups in Ecuador’s Amazon Region.
- While the Ministry of Environment (MAE) maintains that Socio Bosque is a program based on payment for conservation, the nature of the contract is consistent with a contract for environmental services.
- The adhesion contract model is, in essence, the same for indigenous peoples as individual landowners, despite having unique rights guarantees, land titles, and autonomy. It is an all-or-nothing contract and does not allow for any modifications.
- The Socio Bosque agreement between the state and communities/landowners is characterized by an imbalance of power and responsibility, with program participants responsible for the majority of the obligations and penalties, while the state has little or none.
- The MAE functions simply as a regulatory body, overseeing the activities of the partners, with no obligations nor responsibilities under the contract to play a role in the protection of the area under conservation.
- Lands under conservation by the Socio Bosque program are not protected from other state sponsored resource extraction like oil or mining. The conflict between these two competing land use policies remains unresolved.
- Unless proper notification is given to the MAE at the end of the first contract period, the Socio Bosque contract locks the community/landowner into a 40-year contract with no option to terminate the contract without penalty.
- The more hectares placed in the program, the lower the price per hectare, resulting in many communities receiving as little as \$.50 per hectare for much of their lands. The current price scheme serves as a direct dis-incentive for any community to place between 5,000 hectares and 50,000 into the program.

- Unfettered monitoring of compliance with the program that allows MAE to enter indigenous territory or survey it from afar may violate collective rights of indigenous executor communities.
- Sworn affidavits guaranteeing the lands remain in the same state as when placed in the program subject the community representative/landowner to legal risk if any change, even minor, may occur in what could be tens of thousands of hectares of lands without his/her knowledge.
- Requirement, adherence, and reporting of an investment plan subject to MAE approval is at direct odds with indigenous concepts of autonomy and collective rights.
- While communities/landowners face suspension of payment for non-compliance with various clauses, no penalties exist for the MAE if fails to comply with its three obligations.
- MAE has the right to unilaterally terminate the contract with no penalty or restitution to the executor, whereas the executor is subject to a series of legal and financial penalties for early termination.
- If, on the other hand, the community terminates the contract prematurely or is found non-compliant in various clauses, it will have to reimburse the state for up to 100% of the received funds according to the restitution clause. Most groups spend the compensation soon after it is received, however, creating a dangerous scenario for indigenous sovereignty where communities become indebted to the state if they leave, or alternatively, locking communities into staying in the program.
- Indigenous community executors are exposed to significant legal risk—including administrative, civil, and penal actions—for damages incurred by the state in the case of executor non-compliance.
- The contract binds communities/landowners to unknown future regulations enacted by the MAE. Clause 12 could subject Socio Bosque executors to new obligations and programs—such as REDD—without a process of Free, Prior, Informed, Consent (FPIC).
- Methods to resolve disputes overwhelming favor the state, requiring communities/landowners to state sponsored mediation and/or waive right to local judicial process, both of which could require costly prolonged presence in the capital city of Quito.
- Evidence is emerging that entire communities (or even community leaders who signed the contracts) are not fully informed of their rights to enter and leave Socio Bosque contracts, or even, in many cases, the fundamental details about the program.
- Little is known among Socio Bosque participants about REDD, carbon markets, or that the government seeks to adapt the program into a potential REDD mechanism.

CONCLUSIONS:

- While Socio Bosque may be considered a quantitative success, the program in its current form has too many rights concerns to be treated as an overall success.
- The contract itself is predatory, overwhelmingly favoring the government at the expense of the communities—from obligations to the penalties (both legal and financial), to the contract length, unilateral termination options of the MAE, and the dispute mechanism.
- While communities are enjoying the benefit of economic compensation derived from the program, most would like to see the price paid per hectare increase, something that is not guaranteed to happen if Socio Bosque is incorporated into REDD.
- The inclusion of Socio Bosque with UN-REDD further causes concern regarding indigenous rights; a proper process of Free, Prior, Informed, Consultation² must be carried out with existing Socio Bosque partners before they are incorporated into any REDD mechanism or carbon market for the state to meet its rights obligations.

² Art. 57 number 7 of Ecuador's 2008 Constitution guarantees the right to Prior, Free, and Informed *Consultation*.