

Who Owns Carbon in Community Managed Forest?

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Abstract

Nepal has long history of community forest management. Community managed forest was introduced with dual objective: to improve management of forest and to alleviate poverty. It was to reduce the rate of deforestation and to increase the biomass levels of existing forested areas, and thus to increase the rate of uptake of carbon from the atmosphere. As yet, this carbon reduction strategy has not been recognised under the Clean Development Mechanism of the Kyoto Protocol², which is the vehicle by which carbon reduction in developing countries may be financed by North countries. If payment for carbon is to act as an incentive to communities to manage forests in their vicinity however, there has to be some guarantee that they will receive a financial reward for the carbon, as adequate compensation for the work that are made in achieving the sustainable management of their forest. But for this to happen, there would need to be clarity on the ownership issues. This paper will discuss ownership issue and the position of communities in the Forest Act of Nepal.

Community Forestry as a Carbon Strategy

Community forest management is carried out by many rural communities in developing countries, including Nepal, for a variety of reasons. One of its effects is to reduce the rate of deforestation and to increase the biomass levels of existing forested areas, and thus to increase the rate of uptake of carbon from the atmosphere. As yet, this carbon reduction strategy has not been recognised under the Clean Development Mechanism of the Kyoto Protocol³ which is the vehicle by which carbon reduction in developing countries may be financed by North countries. Valorisation of carbon could act as a strong incentive to encourage more communities to manage their forests sustainably. This type of management has many benefits besides the carbon effect: soil erosion prevention, water catchments protection, stimulation of bio-diversity etc. Some writers see the possibility of international payment for carbon uptake in community forests as the key to slowing the rate of deforestation across the globe (Smith, J., et. al., 2003; Subak, S., 2002).

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² At present, only ‘afforestation’ and ‘reforestation’ activities, i.e. the planting of trees on non-forest land, to land that has had no trees since 1990, are permitted to claim carbon credits under CDM

³ At present, only ‘afforestation’ and ‘reforestation’ activities, i.e. the planting of trees on non-forest land for more than 50 years, to land that has had no trees since 1989, are permitted to claim carbon credits under CDM

If payment for carbon is to act as an incentive to communities to manage forests in their vicinity however, there has to be some guarantee that they will receive a financial reward for the carbon, which is significant in their own estimation, that is to say, which they perceive as adequate compensation for the work or sacrifices that are made in achieving the sustainable management of their forest. Trade in carbon could bring money and economic growth to those communities who are managing carbon forests, besides many other side benefits of forest as mentioned above. But for this to happen, there would need to be clarity on the ownership issues. If a community successfully manages a forest in such a way that additional carbon is sequestered, do they have ownership rights over this carbon, and are these rights secure? Are they empowered to sell the carbon credits that they gain as a result of this management? Who in the community holds these rights and how are they distributed within the community, in theory and in practice?

Evolution of Community Forestry in Nepal

In Nepal forestry development can be divided into three eras: Prior 1950s; between 1951-1990 and 1991 onwards.

Prior 1950s: In this period forest was used as a source of income. Forest land in *Terai* was allotted to Rana⁴ family as a tax-exempted forest land. Also forest lands were converted into agriculture land. Nevertheless, rural communities had access to forest and forest products, although, they had to pay taxes to the local functionaries.

Between 1951-1990: A political change ousted the hereditary Rana rule and set a new government. Under the new government, Nationalisation of Private Forest, 1957 was enacted. The intention of this Act was of taking over all the converted forest lands into private land in Rana rule. This Act alienated highly dependent rural community from their very source of livelihood. After the Nationalisation Act, the government enacted Forest Act, 1961. This was the first legislation relating to forestry. This law also failed to recognise the dependency of rural communities in forest. Moreover, it didn't recognise customary right of the people and was completely based on "strict conservation". The main intention of the Forest Act was to deter an exodus of hill migrants, who had settled by encroaching forest lands in Terai. In 1968, Forest Protection Special Act and in 1971, Forest Products (sales and distribution) Rules were enacted. This legislation also prohibited people's rights and access to the forest and forest products.

By 1976 the government had recognised the important role of rural communities in protecting the forest and hence, came up with a new approach by allowing community management in the degraded forest land by enacting Panchayat Protected Rules, 1978. However, it was not effective as it failed to devolve power to the rural communities. Likewise, Leasehold Forest Rules, 1978 allowed communities or individual to lease barren or degraded land for management. All these laws failed to devolve power to the

⁴ Autocratic and hereditary Rana Prime Minister ruled the country for more than 100 years.

rural communities; the question remains as to whether this was by design or by default. By then large scale of deforestation had taken place in *Terai* and in Hill.

Failed forest legislation, was a means for government to conduct rigorous exercise within the forest departments and the outcome of it was the National Forestry Master Plan, 1978. Based on the National Forestry Master Plan the government developed a concept of community managed forest and that was introduced in late 1970s.

1990 onwards: In 1990 democratic movement brought power to people. It was only after the political change, ultimately lead government to formally recognise rural communities as the custodians for forest and to accept the symbiotic relation between man and the forest. The result of this realisation is an evolution of community forest management (CFM) in Nepal.

The evolution of community forests in Nepal started in mid-1980s when deforestation was rampant throughout the country. Nepal is an agrarian society and from high land to the low land rural population is highly dependent on the land they cultivate and the forest from where they derive their basic needs. Forest is a source of livelihood, and most particularly for the poorer sections of the population. Thus improved management by communities under the Forest User Group (FUG) system is envisaged as a means to help these groups particularly (Basnet-Parasai, R., 2006). Over last two decades the community forest management has proliferated in whole country with about more than 20.5% or 1.22 million hectares of land of the national forest under the management of Forest Users Groups (FUG) (Community Forest Department, 2006). In Nepal community managed forest has been seen not just as a tool to improve forest management but also as a means to alleviate poverty and promote equity in communities living in the periphery of the forest areas. In Article 2h of the Forest Act, 1993, community forest is defined as a “National Forest handed over to an Users’ Group pursuant to Article 25 for its development, conservation and utilisation for the collective interest”.

Organisation of Forest User Groups

According to the Forest Act 1993, communities are given full authority to manage the forest, although they do not own the forest or the forest products under the Nepalese law. Communities interested to manage the forest are called “Forest User Groups (FUGs)”. The Forest Act, 1993, has defined Users’ Group as “Users’ Group registered pursuant to Article 42 for the management and utilisation of a Community Forest”.

The characteristics of the organisation of FUGs are that they are socially heterogeneous with members both from wealthy class and weaker section of the society. Each FUGs are allocated forest in its neighbourhood and a management plan (with rules about how the forest can be used) is drawn up and approved by the Forest Department, such that the off-take from the forest is kept within sustainable levels. Government however still has the prerogative to take away the forest, for example if they feel that a community is not managing the forest properly, since the law doesn’t grant legal ownership to community,

only conditional user rights. In other words, communities or the FUGs are only given managerial rights over the forest.

Legal rights of FUGs

According to the Forest Act, 1993, a registered Users' Groups under article 43(1) of the Act is an autonomous and corporate body with perpetual succession. The Users' Groups must have its own seal and is legally entitled to acquire, possess or transfer or otherwise manage movable and immovable property and as an individual may sue or be sued in its own name (art. 43, Forest Act, 1993). Immovable property is that which cannot be moved from one place to another, such as trees, land. Therefore, Users' Group being an autonomous and corporate body having perpetual succession as prescribed by the Act is entitled to have commercial activities of the forest products, without endangering the status quo of the forests when it was handed over for management. In other words, in case of carbon forestry project, the Users' Group is entitled therefore, to do commercial transaction with interested parties while simultaneously conserving forest.

A legal person is that who by law has perpetual legal rights. In other words, a legal person can sue in a civil court and be sued. Having said this, the Act however, has mentioned that whatever trade or anything that the Users' Group do must not contravene the operation plan (work plan) prepared by the help from the District Forest Officer during the handover of the forest area. It means that the Users' Group must not deviate from their original plan. Provided if the Users' Group do a business with the interested party, and if the project is not mentioned in the operational plan, then the Act would not allow transaction. But, as per requirement if the Users' Group make timely amendments in the work plan relating to the management of the community forest and inform it to the District Forest Officer regarding such amendment (art. 26(1)); and if the amendment made in the work plan by the Users' Group pursuant to article 26(1), is considered likely to affect adversely in the environment in a significant manner, the District Forest Officer may direct the Users' Group not to implement such amendment within thirty days from the date when the Officer receives such information. It is the Users' Group to comply with such directives (art. 26(2)).

The Act has also mentioned in Article 25 that the Users' Group may sell or distribute the forest products independently by fixing the prices. If for example sequestered carbon is taken as forest product then pursuant to the legislation the Users' Group is entitled for selling the carbon by fixing a price. Notably, the sequestered carbon is a woody biomass of the trees. Each standing tree and the land that the Users' Group manages, essentially is owned by the State. The Users' Group retain *de facto* managerial rights and typically lack rights to sell or otherwise alienate land through mortgages or other financial instruments (White, A. et. el., 2002).

Managerial rights are those that are *de facto* rights or usufruct rights, which in other words is a contractual right. This right can be considered as tenurial right meaning given for certain period and after the expiration of the contract, the right is ineffective. As in

violation of the managerial right, the person can seek judicial remedy, but only within the parameter of the managerial provision. Ownership rights are legal rights and vested with all the legal immunities. In violation of the ownership right, the person by law is entitled to seek judicial remedy.

In the community forest management scenario, the standing trees and the forest land is a property of the State, wherein the Users' Group have *de facto* managerial right over the forest and do not have essentially the property right over the forest. In other words, the sequestered carbon may not be the property of the Users' Group and may not have the right to do the trading of it or whatsoever of the forest products. In this respect Article 43 of the Act, which recognises Users' Group as autonomous and corporate body with perpetual succession and Article 25 which entitles the Users' Group to sell and distribute the forest products independently by fixing the prices is ambiguous.

Discussion

When talking of forest it should be realised that many rural communities have symbiotic bond with the forest. That is the very source of their daily requirements like fuel wood, herbal medicines are extracted from forest. Additionally the rural people have religious belief of forest and have been taking forest as a right to economic development. Malla (2001) has clearly explained of the human and forest relationship in a forest development in Nepal. This characteristic has made it possible to protect forest from total deforestation despite lack of financial incentives and lack of clarity and certainty as regards ownership. Despite the fact, as noted above, the Forest Act of 1993 (revised in 1999) restates the basic objective of community forestry as of basic needs for rural communities, but without any reference to ensuring that all members of the rural community in fact do benefit. It has restated only the usufruct rights of management over the trees, and the forest product derived from the land but has failed to address legal ownership rights to the forest.

Also in article 27 of Forest Act, 1993, it is mentioned of taking away the community managed forest by the Department of Forest. There have been a number of cases in which forest has been taken away from the community, under what appear to be arbitrary circumstances. This is a contentious issue within the law (Forest Act of 1993; White et al., 2002). For community managed forest, in the case of carbon, if the government take back every benefit that is given to the communities, there will be no motivation for communities to protect the forest. To instil confidence that their benefits will be secured and guaranteed, then there need to be clarity in law. If there are no tangible benefits and no guarantee or security by the law on the rights, there is likely to be less participation and cooperation of the rural communities, since they need to be well motivated (Brown et al., 2003).

It is also argued that once carbon becomes a product that can be sold, the issue of who owns the carbon and who should control the asset of wealth will become crucial, since wealth is associated with property. Also under the current law the Users' Group do not

have legal ownership but only a *de facto* managerial right over the forest, therefore, the issue is more crucial. As Saunders (2003) mentions, “property is more than the relationship between person and thing, it is the relationship between a person (or group) and all other persons in relation to that thing”. When carbon is considered as forest product it will create capital, and with this will come insecurity. As noted, in Nepal even though government has devolved management authority to the rural communities legally, it has not secured the rights of forest products to the rural communities, and communities don’t have any guaranteed ownership of forest products. White et al (2002) have suggested that official legal recognition of community-based rights to forest resources in judicial arena is the way to overcome this problem, but other alternatives might also be possible. The point is rather that the carbon ownership question and the associated rights, duties and payoffs need to be clear and guaranteed; the problem at present is that they are vague and un-guaranteed.

One possible scenario for the future could be for the State to establish carbon ownership as usufruct right of forest users group in a legal way, which would give a guarantee which could not be taken away arbitrarily. But there are other constructions also possible, for example in which the community rather than being the owner of the carbon might be established as its official steward. Under such an arrangement the owner (probably the state/the Dept of Forestry) would claim the international payments for the carbon, but the local community would claim compensation from the owner for the services delivered in managing the forest to make these carbon claims possible, under some form of contract. For at this stage is it unclear whether carbon would be viewed, from a juridical point of view, as a renewable product, similar to non-timber forest products over even agricultural produce, or as a mineral (in which case it might fall under the mantle of the Mines Act, rather than the Forest Act). From this it can be seen that clarity on who is the real owner and what the rights of others are in the system, is essential if there is to be incentive for local communities to participate.

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