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IFM IN CAMEROON AND CAMBODIA: COMPARING TERMS OF REFERENCE

Analysis by Global Witness Research

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1 Introduction

When comparing the Terms of Reference (ToR) for both Cameroon and Cambodia, it becomes apparent that the most important features of these documents is how they divide power between the monitor and the country's government – whether the monitor has to have its activities approved by the government, whether it be taking part in a forest control mission or publishing a public report of its activities. Ideally an monitor wants to have the freedom of action to perform independently of the government, being able to investigate and publish freely, whilst the government wants to restrict the monitor to auditing and commenting on the performance of its own enforcement agents, and that all reports be either confidential or have to be approved before reaching the public. In both cases, a ToR that gives freedom to the monitor (the 2002 ToR in Cameroon, the 1999 ToR in Cambodia,) have been followed by a ToR that restricts its activities (the 2005 Cameroon ToR and the 2004 Cambodia ToR.) This has corresponded with the job of being monitor changing hands, in both cases from Global Witness to another organisation.

2 Cameroon

There are five different terms of reference to compare when considering Cameroon. The first four of which were carried out by Global Witness, and the newest to be carried out by REM:

- 1st SM – refers to the Scoping Mission in May 2000 (05.00 Scoping Trip ToR.doc)
- 2nd SM – refers to the Scoping Mission in October 2000 (2nd SM TdR mission Octobre 2000 - Global Witness comments.doc)
- 2001 ToR – refers to the first full time presence of the Independent Observer in Cameroon, during the Transition Phase from May to November 2001, extended to May 2002 (Terms of Reference May-Nov2001_En.pdf)
- 2002 ToR – refers to the extended transition phase for three years, from May 2002 to March 2005 (Terms of Reference 23 May 2002_En_draft.pdf)
- 2005 ToR – refers to the first competitively tendered Independent Observer in Cameroon which commences from April 2005 for three years (ToR only (En).doc and Contract only (En).doc)

Of these, the first two are qualitatively different from the latter three – they are terms of reference for scoping missions, which were undertaken prior to the full time presence of a monitor, and thus have very little in common with the other ToRs. Thus, only the latter three documents are compared in detail here. This is done thematically, attempting to demonstrate how the ToRs have evolved from the inception of the project through to the most recent contract.

2.1 Major Features

When comparing the ToRs for the Cameroon Independent Observer Project, there are two trends that can be observed. The first is the gradual evolution of the project, and the second is the shift in power between the monitor and the Government of Cameroon.

Project Evolution

The evolution of the project is easily apparent from the ToRs. The 2nd SM is a short document – only 2 pages long including the introductory context, and a large number of the tasks assigned to Global Witness involve the collecting of information, about, for example: allegations of infractions of forest law, disputes between communities and loggers, proposals made for the procedure of allocation of the exploitation titles by the monitor chosen by the Government of Cameroon and so on. Most of the other tasks are of an advisory nature, requiring Global Witness to make recommendations and proposals; the expected results are all recommendations with the exception of

increase media knowledge of the mission. The monitor is expected to make trips into the forest, but this aspect is dealt with in a perfunctory way, with the trips and subsequent report being addressed in two sentences.

The 2001 ToR is more concerned with the activities of the monitor, but its tasks include a large number that deal with setting up infrastructure and training government staff, for example: providing logistic and computer support for MINEF's forest law enforcement department, training MINEF enforcement agents and helping to facilitate the terms of reference for training local NGOs. The monitoring aspect is covered in greater detail, as befits a project where the monitor is now permanently based in Cameroon.

By the time of the 2002 ToR, the forest monitoring system was well established in Cameroon, and so the bulk of the text is taken up by the mandate of the monitor and its rights to partake in activities and receive information. This is similarly true of the latest, 2005 ToR.

The Shift in Power

In the three long-term ToRs, there is a general trend whereby the monitor's power are increased and clarified from the 2001 ToR to the 2002 ToR. but these powers are significantly curtailed in the 2005 ToR, with the monitor losing initiative and the right to act independently of the Government of Cameroon in certain areas. However, the 2005 TOR is also different in that, whilst the ToR refers to the monitor dealing with the Minister of the Environment and Forestry (MINEF), it was the Minister of Economic Affairs, Programming and Regional Development who is the contract partner; this means that the competencies within the government are divided between two different ministries. To differentiate between them in this document, the Minister of the Environment and Forestry will be referred to as the 'Minister', whilst the Minister of Economic Affairs, Programming and Regional Development will be referred to as the 'Contractor'. It is not clear what impact this division will have on the shift in power. Essentially, it means that the Contractor can comment on the annual and quarterly reports, and, more importantly, can demand that staff be replaced, after consulting with the funders, the Delegation of the European Commission. The major differences between the ToRs are summarised in here, and then explained in detail below.

- In the 2002 ToR, a large amount of text is dedicated to the monitor's mandate. However, in the 2005 ToR, there is no mention of a mandate, but there is a section on the 'obligations of the monitor' to the Minister, as well as its 'powers and activities'.
- The 2005 ToR is the first to include a section on the monitoring, audit and assessment of the monitor. This section is within the purview of the Minister.
- The 2005 ToR is also the first to specifically set out the composition of the team, and give person specifications for all the posts, again within the purview of the Minister.
- The overall objective was changed from 'ensuring the objectivity and transparency of control operations' (2001 ToR, 2002 ToR) to 'to contribute to the implementation of the principles of good governance in forestry activities and the improvement of forestry control' in the 2005 ToR.
- References to 'an independent observer with international credibility', which would make its reports and recommendations public, were removed from the 2005 ToR
- **Taking part in logging control missions:** the 2002 ToR expanded upon the 2001 ToR by specifying that the monitor was free to access any documentation required to plan a mission, and that it could propose joint missions of its own, which it could carry out without ministerial sanction if the minister had not given permission within a week of the request. However, these powers were curtailed in the 2005 ToR, with the monitor only being able to partake in a suggested joint mission with the minister's approval, and in addition, it has to have mission warrants issued to it by MINEF

- **Independent investigations:** The 2001 ToR granted the monitor the power to undertake independent investigations; this was expanded in the 2002 ToR to include making verification trips to areas where the enforcement agency had previously performed a mission. However, this latter power was removed under the 2005 ToR, and the monitor has to inform the minister of any planned independent investigations before performing them.
- **Monitor outcome of infringements of forest law:** Whereas the 2002 ToR put the burden on MINEF to provide the monitor with details about legal cases involving infringements, the May 05 put the burden on the monitor to request these details from MINEF.
- **Reports to MINEF:** The 2001 ToR required the monitor to make monthly summary reports to the minister. In the 2002 ToR, this was changed to the monitor making reports about every mission it undertook, and giving quarterly summary reports, as well as being able to make comments on government reports. However, in the 2005 ToR, there is no mention made of the monitor being able to sign off or comment on reports, and its own summary reports are to be made bi-annually.
- **Public Reports:** In the 2002 ToR, the monitor was able to publish its reports after a quarterly meeting with the minister and donors, or if, despite being scheduled, the meeting didn't occur 30 days after its due date; there was no obligation for those reports to be approved. In the 2005 ToR by contrast, any reports have to be approved by the minister before they can be published. In addition, in the contract, the monitor is prevented from commenting on 'the project or services' without the Contractor's prior approval.
- In the 2002 ToR, the monitor is explicitly exempt from having to follow clauses in the contract that goes against the spirit of the ToR, which demonstrates in and of itself that the ToR is tilted in favour of the monitor.
- The tilt in favour of the Government of Cameroon, on the other hand, is amply demonstrated by the ability, granted to the Contractor in the 2005 ToR to have staff members from the independent observation team sacked if the EC delegation agrees.

2.2 Detailed Comparisons

2.2.1 Objectives

Ensure the objectivity and transparency of control operations

2nd SM

'Support MINEF in the running of a new control mission and the follow up of forest exploitation to make the mission more efficient and transparent.'

2001 ToR

'To ensure the objectivity and transparency of control operations conducted by MINEF by including an independent observer with international credibility, whose reports will be published.'

2002 ToR

'To ensure the objectivity and transparency of monitoring operations undertaken by MINEF through the participation of an independent observer with international credibility, the reports and recommendations of which will be made public.'

2005 ToR

'The overall objective is to contribute to the implementation of the principles of good governance in forestry activities and the improvement of forestry control.'

- 1. to observe the implementation of procedures and the conduct of forestry control activities inside the country;*
- 2. to observe the conduct of forestry law infringement monitoring as well as litigations inside the country;*

3. to see to the transparency of information relating to logging.’

Comments

Up until the most recent ToR, the trend within the phrasing of this objective has been to increase the capabilities accorded to the monitor – in the 2001 ToR, it is referred to as ‘*an independent observer with international credibility, whose reports will be published*’, whilst in the 2002 ToR it is expanded to ‘*the reports and recommendations of which will be made public*’. However, the 2005 ToR is a major departure from this: it does not refer to the monitor ensuring the objectivity and transparency of monitoring operations, but rather to ‘*the implementation of the principles of good governance in forestry activities and the improvement of forestry control.*’ Whilst it does later expand this to include observing the ‘*procedures and conduct of forestry control*’, ‘*the conduct of forestry law infringement monitoring*’ and ‘*the transparency of information relating to logging*’, it does not mention that the monitor has to have international credibility, or that its reports and recommendations will be made public.

Strengthen operational capacity of control departments

2001 ToR

‘To strengthen the operational capacity of MINEF’s control departments, and particularly the [Central Control Unit;] CCU’

2002 ToR

‘To strengthen the operational capacity of MINEF law enforcement services and, particularly, the CCU, through the application and improvement of procedures’

Comments

The objective of improving the capacity of MINEF’s control departments was not mentioned in the most recent ToR in any form.

Analyse clarification of control methods

2001 ToR

‘To facilitate clarification on the means of control, through a description of the roles of those involved in forestry control, and the development of a precise reference system for infractions and sanctions, based on the legal and regulatory framework in force.’

2002 ToR

‘To analyse clarifications in control methods through the role of the different players in forest monitoring and the follow up for a precise reference list of offences and sanctions, based on the legal and regulatory framework in force.’

Comments

Similarly, the objective of clarifying control methods was not included in the 2005 ToR. However, it was included in the monitor’s activities in a vague form, as is shown later in this document.

2.3 Activities

Draw up control mission

2001 ToR

‘Draw up detailed control programme with the CCU’

2002 ToR

‘In the two weeks following the signing of this contract, a quarterly control mission programme designed jointly by the CCU and the Independent Observer will be established. This programme will be detailed and will cover the different

provinces and logging titles, focusing particular attention on provinces and titles that have not been subject to sufficient control mission during the last CCU control mission schedule.'

Comments

In a trend that is common across the entirety of the documents, the 2002 ToR reference to drawing up a control mission is far more detailed and precise with regard to timeframes and what needs to be carried out. This particular activity is not included in the 2005 ToR.

Participate in logging control missions

2nd SM

'Make field trips to verify and document the concerned allegations and disputes.'

2001 ToR

'Support CCU field mission by participating in logging control missions, regardless of the type of title or permit, including removal of auctioned wood.'

'The independent observer will monitor the conduct of control missions by the CCU, will have access to all documents relative to these missions, and will observe all phases of the control mission, up to and including submission of the detailed reports (procès-verbaux) to the Minister.'

2002 ToR

'Support the CCU's field missions by participating in law enforcement mission to monitor logging operations, regardless of the kind of title or authorisation, including the removal of auctioned wood. Consequently, the independent observer will have free access, without the need for prior authorisation, to all documents necessary for the preparation of any mission. The independent observer may continue a joint investigation mission if, for any reason, the CCU is not in a position to continue. In this case, the Independent Observer will, in all cases, produce an information report for the attention of the Minister or his representative.'

'In addition to joint missions, the CCU and the independent observer may also jointly conduct a requested mission. These missions are requested by the independent observer and approved by the minister or his representative, following one or several complaints received from local NGOs or other sources. In the case of a requested mission, the authorisation to conduct such a mission must be granted by the minister or his representative within a relatively short length of time, and not to exceed one working week, from the date of submission of the request. In relation to this mission, the independent observer will maintain a maximum synergy with the CCU. If authorisation to undertake, together with the CCU, a requested mission is not forthcoming within a relatively short period of time, not to exceed one working week, in order to avoid losing proof and signs of proof of an offence, the independent observer will have the right to undertake a mission to verify the facts without a CCU presence. In this case, the independent observer will take the original mission request and will work in close collaboration with local control staff.'

2005 ToR

'Observing the different aspects and appreciate the various forestry control activities'

'he shall take part in meetings to plan missions and in field trips;'

'a mission order shall be issued him by the competent services of the Ministry of the Environment and Forestry;'

'he may recommend the holding of extraordinary control missions deemed useful and carried out jointly with the competent services of the Ministry of the Environment and Forestry, with the authorisation of the Minister;'

'For all matters concerning the exercise of his duties, the Independent Observer shall enjoy the total collaboration of the competent services of the Ministry of the Environment and Forestry. He shall have access to the necessary information on his request.'

Comments

The powers the monitor has to monitor the Cameroonian enforcement agency are obviously key to its job; the clauses in the ToRs setting out the monitor's powers have expanded and altered significantly through the different versions. The 2nd SM's is only one sentence long, and merely states that field trips should be made to observe alleged disputes. The 2001 ToR, the first to be written for a monitor rather than a scoping mission, expands upon its predecessor to affirm that the

monitor can participate in all logging control missions, and that it will have access to all documentation and all phases of the mission.

The 2002 ToR section covering the monitoring of logging control missions is far longer and more detailed, and gives the monitor a lot of freedom of action. It is allowed access to any documents it needs to prepare a mission. There are safeguards against ministerial inaction, with the monitor expressly permitted to conduct missions that it has requested at the behest of local complaints a week after submitting the proposal to the minister if the minister has not responded; the minister is not therefore able to hamper the monitor's investigations through bureaucratic inaction.

However, in the 2005 ToR, the initiative has passed from the monitor to the minister. The monitoring of the CCU is reduced to half a sentence 'he shall take part in... field trips', and it has to have a mission order issued to it, rather than being able to participate in any investigation without needing explicit authorisation. In addition, it will no longer be able to perform a mission that it recommends without obtaining permission from the minister, as opposed to the previous ToR, which allowed the mission if the minister had not replied within a week.

Independent investigations

2001 ToR

'Provide MINEF with the results of other investigations freely conducted into illegal logging activities during the implementation of the control programme. In addition to the mandate of observer linked to MINEF control mission, the expert is authorised to make observations of logging, as is any person or association legally established in Cameroon'

2002 ToR

'To report to MINEF the results of other freely-undertaken investigations into logging operations during implementation of the established control programme. In addition to the joint missions, the independent observer will conduct verification missions, understood as being missions undertaken by the independent observer to confirm or invalidate a report produced by the CCU following a field mission where the independent observer was not involved. Verification missions are conducted at the request of the minister or his representative, contracted by a logging company, a donor, a population concerned in question or the independent observer. The independent observer must obtain authorisation from the minister or his representative within a relatively short period of time, not exceeding one working week from the date of the request.'

2005 ToR

'he may equally carry out independent missions to observe logging activities. As such, he shall inform the Minister before hand and render account to the latter of the findings of his missions carried out for particular purposes.'

Comments

The articles referring to independent monitoring missions follow the same arc as that for logging control missions: they are expanded until the 2005 ToR, where they are cut back and more power is given to the minister. In the 2001 ToR, the monitor is empowered to freely conduct independent investigations the reports of which can then be furnished to MINEF. In the 2002 ToR, it can also conduct verification missions of Government of Cameroon missions in which it did not partake under its own volition (*'verifications missions are conducted at the request of... or the independent observer'*.) However, in the 2005 ToR, this power has been removed, and the monitor has to inform the minister before undertaking independent investigations, removing its ability to undertake missions that are completely incognito.

Help to clarify roles of existing control structures

2001 ToR

'Help to clarify the role of the various control structures; these recommendations should be aimed at facilitating the implementation of the recommendations of the institutional review.'

2002 ToR

'Through its recommendations, the Independent Observer will help MINEF: - to clarify the roles of the various existing control structures;'

2005 ToR

'Making recommendations aimed at improving forestry control and monitoring of infringements against the forestry law'

Comments

The article in the 2005 ToR is far vaguer than that of the two before it. This is both a positive and negative development, as the mandate can be interpreted more widely, and thus allow for recommendations to be made on other aspects of forest control, but at the same time the monitor's mandate to specifically make recommendations regarding MINEF's control structures has been removed and thus, the likelihood of these recommendations being followed has been considerably reduced.

Monitor outcome of infringements of forest law

2002 ToR

'The independent observer will attend all subsequent hearing of any accused person whose offences were not the subject of an official statement during the course of a mission. The CCU is required to inform the independent observer of the dates on which such hearings will take place by sending copies of the notices of hearing to the independent observer.'

2005 ToR

'(4) he shall be informed, upon his demand, by the Ministry of the Environment and Forestry, on the progress on the processing of files on infringements against the forestry law and litigations;'

'1. the services of the Ministry of the Environment and Forestry shall inform him, upon his demand, on all the stages of the administrative and legal procedure (suing in court exclusively) relating to infringements and shall forward to him the dates of the charges, so that he can take part or enquire about the outcome of the various infringement reports;'

'3. the independent observer shall be authorised to take part as an observer in any subsequent charging of an offender if the facts for which he is being charged were not entered in a report during a control mission;'

'Getting informed, upon his written demand, on the outcome of infringements observed by the competent services of MINEF or reported by other administrative structures and on the Minister's decision on infringements against the forestry law;'

Comments

The most interesting change between these two ToRs is that the burden for information on the progress of procedures relating to infringements against forestry law and litigations has moved from MINEF to the monitor. Whereas in the 2002 ToR it was incumbent upon MINEF to inform the monitor, in the 2005 ToR it is the monitor who must request the information from MINEF; the wording is ambiguous as to whether MINEF must forward the dates of all charges or only those it has requested. In addition, the legal procedures about which the monitor should be informed has been restricted to *'suing in court exclusively'*.

Establish a case-tracking system

2001 ToR

'Facilitate the establishment of a Case Tracking System (CTS) in collaboration with SIGIF and the Forestry Tax Revenue Securement Programme (FTSP) as well as a Mission Monitoring System (MMS) in order to ensure that all titles are controlled equitably and to draw up a record of controls for each company and each permit.'

'A proposal for the drafting of a CTS and an MMS drawn up in collaboration with the SIGIF and the FESP, as available'

'A control programme developed jointly by the CCU and the independent observer effectively implemented and monitored by the independent observer'

2002 ToR

'Through its recommendations, the Independent Observer will help MINEF: - to establish a Case Tracking System (CTS) in association with MINEF's legal department, SIGIF and the Programme to Secure Forestry Revenue (PSFR), plus a Control Mission Monitoring System (CMMS) with the aim of ensuring that all titles are equitably monitored and that an objective monitoring record is established by company and by title;'

'Recommendations from the Independent Observer relating to improvements in monitoring and control, in particular: formulation and implementation of an CTS (Case Tracking System) and an CMMS (Control Mission Monitoring System) designed in association with the SIGIF, the PSRF and MINEF's legal department.'

'A quarterly control programme designed jointly by the CCU and the Independent Observer and monitored by the latter.'

Create a list of infractions and sanctions

2nd SM

'Recommendations for MINEF on the sanctions against companies having committed infractions to forest legislation'

2001 ToR

'A reference list of infractions and sanctions to be drawn up by a lawyer'

'Help to establish a reference system for infractions and sanctions on the basis of the legal and regulatory framework in force'

2002 ToR

'A reference list of offences and sanctions'

'To analyse clarifications in control methods through the role of the different players in forest monitoring and the follow up for a precise reference list of offences and sanctions, based on the legal and regulatory framework in force.'

Comments

None of three activities above are included in the 2005 ToR. This may well be because the systems requested had been successfully been established by this time it was drawn up.

Report to the Government of Cameroon

2nd SM

'Prepare short reports in collaboration with MINEF controllers describing if necessary illegal activities in each visited site and formulating recommendations for MINEF'

2001 ToR

'The Observer will submit a detailed monthly report on each of the control missions to the Minister, particularly noting respect for procedures and for the mission orders, as well as general comments and recommendations.'

'Field mission reports to be jointly signed by the CCU and the independent observer; monthly reports by the observer to MINEF'

'Reports as necessary by the independent observer to MINEF on information collected from free observations.'

2002 ToR

'The Observer will send the Minister or his representative a detailed report of each of the control missions, indicating in particular its observations regarding respect for procedures and mission orders, along with general observations and its recommendations.'

'Within a week of returning from a mission, field mission reports and official statements signed by the CCU; joint mission reports being initialled by the independent observer; every mission (joint, requested or verification) of the Independent Observer will give rise to its own report. Each quarter, the Observer will send a summary to MINEF.'

'It will put its initials on the CCU reports, compare them with data collected and, where necessary, make observations in the margin.'

2005 ToR

‘Making relevant recommendations to the Minister after each field trip, in order to improve control, the monitoring of infringements against the forestry law and the transparency of information relating to forest activities.’

‘At the behest of the Minister of the Environment and Forestry, specific reports on the control and monitoring of litigations shall be drafted by the Independent Observer.’

‘after collegial discussion with officials of the services concerned, the independent observer shall enter his own remarks and observations on the monitoring of infringements against the forestry law in periodic reports sent to the Minister of the Environment and Forestry. Therein he shall draw the appropriate conclusions and make recommendations on the relevance and respect of procedures and on the quality of the monitoring of infringements against the forestry law carried out by workers of the Ministry of the Environment and Forestry;’

‘The independent observer shall enter his remarks, analyses and recommendations in his different reports: mission reports, bi-annual and annual summary and analysis reports, ad hoc reports requested by the Minister of the Environment and Forestry and covering specific aspects of forestry control and monitoring of infringements against the forestry law.’

‘Reporting objectively and in a constructive manner the remarks and observations made in the field;’

‘The Project Owner and/or the Project Manager and the European Commission Delegation shall give their opinion about the quarterly reports and annual reports and documents provided for in the Terms of Reference (Appendix A) within a 30-day deadline. After this deadline, the reports shall be considered as approved.’

Comments

As with other articles, the specifications for reporting to MINEF became far more detailed after the monitor was established. In the 2001 ToR, the monitor is obliged to submit a monthly report to MINEF, as well as signing off on all field mission reports in which it was involved and making reports of its independent investigation. In the 2002 ToR, this has changed to the monitor giving a detailed report of each control mission, as well as a quarterly summary; the monitor is still also required to sign off on joint control mission reports, but can now also make comments and remarks in the margin. The 2005 ToR changes this in two ways – the monitor no longer signs off on joint control missions and cannot make comments in the margin, joint missions themselves are not directly referred to in the ToR. Also, the summary reports now need to be produced bi-annually rather than quarterly; there is also a change in language, with the summary reports now being written *‘after collegial discussion with officials of the services concerned’*. The monitor is tasked for the first time with producing *‘specific reports on the control and monitoring of litigations’*, but only at the behest of the minister. Finally, it is now not only MINEF (the project manager,) which can give its opinion on quarterly and annual reports – the project owner (the Ministry of Economic Affairs, Programming and Regional Development) can also give its opinion.

Public Reports

2nd SM

‘Release to the media the results of the mission at national and international level’

‘Propose and implement a strategy of communication of the results of the mission at the national and international level (press conference, news articles)’

2002 ToR

‘Within the context of publication of the independent observer’s reports, validation meetings will be held every three months, as from the date of signing of this contract between the Minister or his representative, the donors and the Independent Observer. To this end, this latter is authorised to make all necessary material and data available to those concerned. At the end of this quarterly meeting or, failing this, 30 days following the anticipated date, the Independent Observer is authorised to publish its reports.’

2005 ToR

‘The independent observer should also facilitate the dissemination of information validated by the competent services of the Ministry of the Environment and Forestry and dialogue between representatives of the civil society, the private sector and services concerned with control. After validation by the selection committee and approval by the Minister,

the independent observer shall publish his reports and conclusions regularly on the progress of his mission, including on his web site.'

'Contributing to better transparency in the process of providing information on the forestry sector especially vis-à-vis the general public, by publishing his reports;'

'Reporting objectively and in a constructive manner the remarks and observations made in the field;'

Comments

The monitor's ability to publish its own independent reports and distribute them to the public has been strongly curtailed in the 2005 ToR, compared to the 2002 ToR. In the earlier ToR, the monitor was able to publish its reports after quarterly meeting between itself, MINEF and donors, or 30 days after such a meeting was planned; the Cameroonian authorities were therefore not able to prevent the publication of these reports through inaction, nor does the ToR suggest that the minister or the donors had to approve reports before they could be published. However, in the 2005 ToR, the monitor is required to *'facilitate the dissemination of information validated by the competent services of the Ministry of the Environment and Forestry'*, and can only publish its reports after *'[a]fter validation by the selection committee and approval by the Minister'*. Finally, the monitor is required to report its observations *'in a constructive manner.'*

2.4 Articles appearing in the associated contracts

Protection of the monitor

2002 Contract

'Any contractual clause contrary to the terms and spirit of the « Terms of Reference », along with the current contract for the same services between the Consultant and DFID, will not be binding upon the Consultant. - Any restrictive measure or sanction applied to the Consultant by the Ministry of Environment and Forestry prior to the signing of this contract will not be binding upon the Consultant.'

Sacking of Staff by the government

2005 Contract

'If the Project Owner, together with the European Commission Delegation, consider that one of the staff in activity is not suitably qualified for the job, the Contractor shall, within a deadline of 21 days, provide at its expense, a substitute with at least equivalent qualification and experience and deemed acceptable by the Project Owner.'

Ethics and Loyalty

2005 Contract

'Art.46.4: A Contractor shall act in all situations with impartiality and as a loyal adviser in accordance with his professional code of ethics. He/she shall refrain from making public statements about the project or services without the prior approval of the Contracting authority. He/she shall not commit the contracting authority in any manner whatsoever without the prior written consent of the latter.'

Comments

The clause that explicitly that prevents contractual clauses going against the spirit of the ToR in the 2002 contract is notably absent from the 2005 documentation. Instead, in the 2005 contract, the Contractor has gained far more power relative to the monitor, as is shown by the two articles quoted above, the first of which allows a staff member to removed from the independent monitoring project if the Ministry of Economic Affairs, Programming and Regional Development and the EC delegation agree, and the second of which prevents the monitor from making statements about *'the project or services without the prior approval of the Contracting authority'*. However, it is interesting to note that it is not MINEF that benefits from these changes directly, but rather the Ministry of Economic Affairs, Programming and Regional Development.

3 Cambodia

The two Cambodian ToRs are:

- 1999 ToR – refers to the Independent Monitor contract from 1999 to its suspension in 2003, carried out by Global Witness. It is supplemented by a Reporting Protocol, which was jointly agreed after negotiations in 2001.
- 2004 ToR – refers to the Independent Monitor contract for one year, renewable, which started in January 2004, carried out by SGS. This comes in two parts, a Terms of Reference written prior to awarding the contract, and a Contract Annex, negotiated between SGS and the Royal Government of Cambodia in order to clarify these ToR

These are far more similar than any two of the Cameroonian ToRs, and many of the articles are identically phrased. However, there are major differences between them as well – a major one being that in the 2004 TOR the monitor is explicitly '*not be responsible for undertaking any monitoring or inspection activities for the primary purpose of detecting and investigating such incidents.*'

From reading the ToRs, it would appear that the two trends identified in the Cameroon ToRs – of increasing professionalism in drafting the ToRs, and also increasing government power in regards to the monitor are also apparent here.

3.1 Major Features

Project Evolution

The increasing professionalism is demonstrated in the Contract Appendix, which set out the activities of the monitor in far more detail – describing the parameters for forest trips, aerial reconnaissance and the use of satellite imagery, as well as set forward a work-plan that includes creating a reporting database. However, it should be borne in mind that this Appendix was negotiated at the instigation of the monitor after the ToR had been drawn up. This suggests that in the case of Cambodia, it is monitor who is concerned about having more specific terms under which to operate rather than the Cambodian Government, and that without the monitor's insistence, the Terms of Reference may well have remained vague and less professional.

The Shift in Power

- The 2004 ToR includes a specific person-specification, including a requirement for 15 years experience in forest resource management and crime monitoring.
- The 1999 ToR and its reporting protocol both have long articles covering the government's (and the monitor's) obligation to provide supporting documents within ten days of a request – this is not mentioned in the 2004 ToR.
- The 1999 ToR refers to the monitor providing '*independent oversight*', whilst the 2004 ToR states the monitor's purpose is to '*validate*' that all forest crimes are being reported.
- The 2004 ToR allows for quarterly progress reports to be disseminated to the public once they have been verified by the Cambodian government or 30 days have passed. In comparison, the 1999 ToR allows the monitor to produce briefing documents that can draw on forest crime reports and progress reports, and does not have to be verified by the government.
- In the area of forest crime reporting, the 1999 ToR sets forward a comprehensive set of actions that should be followed by the government, as well as procedures for the monitor to attain information on the process, and what information can be published when on the process of dealing with forest crimes. The 2004 ToR, on the other hand, puts off setting out the procedures until after the contract has been signed.

3.2 Activities

3.2.1 Purpose of Monitoring Team

1999 ToR

'Provide independent oversight to ensure that the Ministry of Environment and Ministry of Agriculture Forestry and Fisheries are in compliance with all provisions of the 25 January 1999 Declaration on Management of Forests and the Elimination of Forest Illegal Activity.'

'Provide for audit and monitoring mechanisms to ensure compliance with established guidelines in eliminating forest illegal activities.'

2004 ToR

'To validate that all forest crimes are being reported and that reported actions have been accomplished by the competent agencies of the [Royal Government of Cambodia;] RGC.'

Comments

Whilst the two ToR's clauses on the purpose of the monitoring team carry the same essential meaning, there is a change in language – whereas the 1999 ToR speaks of the monitor providing *'independent oversight'* over the various responsible ministries, which are named. In comparison, the 2004 TOR monitor is to *'validate'* that forest crimes are being reported and dealt with correctly by the *'competent agencies'* of the RGC, which is a slightly weaker and vaguer phrasing.

3.3 Reporting

3.3.1 Reporting duties outlined in the ToRs

1999 ToR

'submit a mid-term progress and a final report of findings, conclusions and recommendations to the FAO Representative in Cambodia.'

2004 ToR

'submit report of findings, conclusions and recommendations to RGC and donor community with copies to MAFF and MoE.'

'disseminate report findings, conclusions and recommendations in public after its report is verified completely by RGC's concerned agencies.'

3.3.2 Report definitions and protocols

Progress Report

1999 ToR

'Progress Report: is an examination and evaluation of the project performance, concessionaires' activities records, compliance with laws, regulations, and executive regulations for forest estate lands, national parks and protected areas. Progress Reports will contain opinion within the conclusions and recommendations provided to government. Progress Reports are intended to assist government in achieving its commitment to forestry reform in Cambodia. Progress Reports, will be prepared by Global Witness for the government in compliance with the project document.'

'Progress Reports: are forwarded to the Focal Point Coordinator with copies to Ministers of MAFF and MOE by Global Witness' Phnom Penh office. A copy is forwarded at the same time to CMB/99/A05 FCMR (UNTS/CMB/001/DFI) (FAO/UNDP), and concerned donors. Any government, donor and/or CMB/99/A05 FCMR (UNTS/CMB/001/DFI) (FAO/UNDP) response should be forwarded to the independent monitor within twenty (20) working days and should address factual elements. The release of Progress Reports to the public will be the responsibility of the government.'

2004 ToR

'Quarterly Progress Reports: will be prepared following the completion of the project inception phase. These will review the reports examined from all sources (e.g. Government, NGOs, media) and provide an evaluation based on the IM review of the Government's performance and compliance with laws regulations and executive regulations for forest estate land, national parks and protected areas. The response of Government agencies to all Incident Reports submitted to the IM will also be reviewed. The Progress Reports will include findings, conclusion and recommendations to the RCG and are intended to assist Government in achieving its commitment to forestry reform in Cambodia.'

'These reports will be released to the donor community and public as per the Special Condition of Contract. This means that they can be released after being verified by the RGC's agencies. After 30 working days from submitting reports to these RGC Agencies the IM has the right to release the reports regardless of the verification.'

Briefing Document

1999 ToR

'Briefing Document: a report or document that provides an overview to the public of the forestry sector in Cambodia containing information from a selected number of progress reports and/or forest crime reports and will provide an analysis of the overall effectiveness, constraints, and/or weaknesses, regarding the issues addressed in the FCMR project document. It may contain supporting documentation, photographs, etc., and will express opinion of the combined results and will mainly contain information provided to all parties previously through Progress Reports and/or Forest Crime Reports. Briefing Documents are the product of Global Witness.'

'Briefing documents: are forwarded to the Focal Point Coordinator with copies to the Ministers of MAFF and MOE. A copy is forwarded at the same time to the CMB/99/A05 FCMR (UNTS/CMB/001/DFI) (FAO/UNDP). Any government and/or CMB/99/A05 FCMR (UNTS/CMB/001/DFI) (FAO/UNDP) response should be forwarded to the independent monitor within fifteen (15) working days. The analysis is that of the independent monitor and any modification is at their discretion. The distribution of all Briefing Documents will be supported by a copy of any government response provided, to the information presented therein.'

Comments

As in the 2005 ToR for the Cameroon monitor, the 2004 ToR has a specific clause that prevents reports being released to the public before being *'verified completely'* by the Cambodian government. However, as is shown in the Contract Appendix 2004 ToR, the monitor has the right to release quarterly progress reports to the public after 30 working days regardless of whether they have been verified or not. The 1999 ToR, on the other hand, does not allow for the release of progress reports to the public; instead the article on briefing documents allows them to source from both progress and forest crime reports for creating a document to be released to the public.

Forest Crime Report

1999 ToR

'Forest Crime Report: a report providing factual information of an incident of alleged or suspected illegal activity. Supporting documentation will be provided, with possible limitations, to protect the safety and security of sources, witnesses, staff, and/or parties. Forest Crime Reports will be provided to the FCMU by monitors from MAFF and MOE, Global Witness and the public sector in compliance with the project document reporting procedures.'

'Forest Crime Reports: are forwarded to the Director's of Department of Forestry & Wildlife and Department of Inspections with copies to the Ministers of MAFF, MOE and Focal Point Coordinator at the Council of Ministers for immediate action and to the CMB/99/A05 FCMR (UNTS/CMB/001/DFI) (FAO/UNDP). Forest Crime Reports submitted to the appropriate FCMU are made available to the independent monitor. The recipient of the forest crime report should acknowledge receipt of the crime report in writing. Upon the written request of the independent monitor or any other reporting party regarding a specific case, a maximum five (5) working day period (1 week) is established for government's designated recipient to provide a written response to the independent monitor. The response should indicate the government's prioritization rating determination and case background information for high priority cases. Thirty (30) working days thereafter, the government's designated recipient will prepare and provide a status report detailing investigative findings as well as plans and supporting documentation to the reporting party. Every thirty (30) working days thereafter, the government's designated representative shall prepare and make available upon request an updated status reports and documentation until the investigation has been completed and forwarded to the courts for legal action or closed. Justifications for closing a case will be explained and clarified within the database and each case file. The independent monitor may, upon request, access the database and case files as part of the monitoring process. The independent monitor may release the information with consultation with the concerned authority to the greater public after the above described time periods, and, if available, will provide government's response as part of

the release. The independent monitor may disseminate findings at any given time there is non-compliance with the abovementioned protocols or when the independent monitor has adequate justification that information sharing is failing or the investigation is seriously flawed.'

2004 ToR

'Incident Reports: These are reports providing factual information of an incident of alleged or suspected illegal activity as provided to the IM by NGOs or other interested stakeholders. They may also arise from activities discovered accidentally by IM staff in the course of carrying out their field duties. These will be provided to the concerned agencies of the RGC together with any available supporting or corroborating documents. However, the IM will not be responsible for undertaking any monitoring or inspection activities for the primary purpose of detecting and investigating such incidents.'

'The procedure and format for presenting these reports will be agreed with the RGC in the contract inception phase. Procedures for potential "whistle blowers" to report to the project will also be finalized at the project inception phase - after consultation with stakeholders. Details of each Incident Report will be held on the database together with the results of follow up activity: by the relevant RGC agency and by the IM with the relevant agency. The results of this follow up activity will be reported quarterly as described already.'

Comments

The later Reporting Protocol of the 1999 ToR puts forward a detailed and systematic procedure by which the monitor can demand knowledge of the status of proceedings against those accused of forest crimes, and also when this information can be disseminated to a wider public. The obligation is upon the monitor to demand the information from the government, as is the case in the 2005 Cameroon ToR, but unlike in that document, if the monitor feels that the procedures are not being followed, and that it is not receiving the necessary information, it can release what it does have to the public. In comparison, the 2004 ToR explicitly states that *'the IM will not be responsible for undertaking any monitoring or inspection activities for the primary purpose of detecting and investigating such incidents.'*, and the procedures for reporting them are not detailed in the ToR, which leaves the monitor with little room to bargain, as it has already signed a contract with the Cambodian government.