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CHALLENGES AND OPPORTUNITIES OF RECOGNIZING AND PROTECTING CUSTOMARY TENURE SYSTEMS IN CAMBODIA

Policy Brief



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Key Messages

- Indigenous peoples' rights to their customary lands are acknowledged in the national legislation of the Royal Government of Cambodia.

- The process of formalizing these rights, however, remains cumbersome, and measures need to be taken immediately to create more efficient procedures and to widen the scope to include additional land-use types (e.g., forest areas, grazing lands, and collectively managed waterbodies).

- The concept of indigenous peoples – in the context of recognizing customary land rights – needs to encompass the majority of the rural Khmer population as well as other ethnic groups.

Background

This policy brief was developed in order to enable a meaningful engagement and policy dialogue with government institutions and other relevant stakeholders about challenges and opportunities related to recognizing customary tenure in Cambodia. It aims at strengthening the recognition and legal protection of customary tenure systems in the country in line with the key principles of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) (FAO/CFS, 2012).

In the Mekong Region, as in many parts of the world, land and natural resources are becoming scarcer due to several factors, including government grants of large land concessions to national and foreign investors, land speculation, climate change, forest exploitation, urbanization and population growth. Indigenous people, ethnic minorities and other communities rely on their ancestral lands and related natural resources for their livelihoods, often without having legal recognition of their customary rights. Once these communities lose their land and access to natural resources, their entire livelihood, the preservation of their customs and traditions, their shelter and means for an adequate standard of living are at risk.

In Cambodia, customary tenure is often linked with land rights of indigenous peoples communities (IPCs). However, not only IPCs require access to land and natural resources through customary tenure systems. Rural Khmer populations and other communities may depend on these systems as well. Only IPC land and monastery land, both under collective ownership regimes according to the Land Law, are eligible for titling. Communal land titles (CLT) are issued to IPCs, while monastery land is registered in the name of the pagoda under the systematic land registration approach. CLTs are not available for non-indigenous groups.

Cambodia recognizes 24 different indigenous people groups, with somewhere between 160,000 and 250,000 individuals, representing one 1.0 or 1.5 percent of the country's population (CCHR, 2016). According to the Land Law (2001), an indigenous community is defined as “a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practise a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use” (art. 23). Yet, the exact definition of indigenous people remains vague when it comes to specific groups, such as the Lao-speaking minority in Cambodia.

There are approximately 455 indigenous villages in Cambodia, although the actual number depends on the categorization of what constitutes an IPC because many indigenous people live intertwined with Khmer people. The Ministry of Land Management, Urban Planning and Construction (MLMUPC), which is in charge of surveying and registering communal land, maintains the practice of only granting collective land titles to villages where at least 60 percent of the population is indigenous.

Land conflicts in Cambodia have been on the rise, creating challenges for agricultural productivity, socioeconomic development and investments. The lack of recognition and safeguards of customary tenure rights, especially in the context of large-scale land investments, have been one of the most contentious and complicated land-related issues in recent times.

Land speculation is a rapidly spreading phenomenon. Areas under customary tenure have successively and increasingly come under threat by the allocation of forest concessions, the issuing of large-scale economic land concessions (ELCs), and, lately, by the important internal migration of people to the uplands. In Cambodia, indigenous peoples often live in low population densities, and in relatively fertile, hilly areas with favourable microclimates that have increasingly been the subjected to the expansion of cash crops.

Regulatory framework

Within Southeast Asia, only the Philippines and Cambodia fully acknowledge indigenous peoples' rights to their customary lands in their national legislation. Cambodia supported the Declaration on Indigenous Peoples Rights of the United Nations but did not sign the International Labour Organization Convention 169 on Indigenous and Tribal Peoples. The Constitution of the Kingdom of Cambodia (1993, art. 32) states that "Khmer citizens are equal before the law and shall enjoy the same rights, freedom and duties", without referring to the concept of indigenous people. Article 41 of the Cambodian constitution ensures that every Khmer citizen has a right to private and collective property ownership.

The National Policy on Development of Indigenous Minorities (2009) sets the policies of the Royal Government of Cambodia (RGC) with regard to indigenous peoples. The policy's vision is to ensure land security for indigenous people. Some of the stated goals of the policy are that all indigenous people must have decent living conditions, be free of hunger and extreme poverty, and that indigenous culture must be well protected and maintained. Together with the Land Law (2001), this policy gives recognition to the rights of indigenous peoples to traditional lands, culture and traditions, and these rights are reaffirmed in the National Land Policy (also known as the White Paper), which was officially endorsed in August 2015.

The Land Law specifies the rights of indigenous peoples to land, and recognizes the social, spiritual, cultural and economic values of indigenous peoples' land. Article 25 of the Land Law stipulates that indigenous communities can exercise collective ownership over land where they have established residence and where they carry out traditional agriculture. The law clearly states that no other external agencies should have rights to occupy private or collective properties of indigenous peoples (art. 28). Land plots can only be sold or transferred among community members, and this needs to be agreed on by the whole community.

One important restriction to recognizing customary tenure is mentioned in Article 7 of the Land Law, which specifies that "no regime of ownership of immovable property prior to 1979" is legally recognized, which effectively constitutes a cut-off date for any traditional land claims.

The Forestry Law (2002) generally recognizes indigenous peoples' traditional rights to natural resources and the practice of shifting cultivation. This law clearly acknowledges traditional rights to forest use at a "family scale" – with respect to indigenous traditions, culture, belief and ways of making a living – for local communities living in, or nearby, state forests. Traditional community rights include the extraction of forest products without authorization, such as collecting firewood, wild fruits, honey and resins, and harvesting other forest products, using wood for constructing houses and fences, and grass cutting. The Forestry Law also provides a legal basis for rural communities to help manage forests through community forestry. The Sub-Decree on Community Forest Management (2003) sets out rules for the establishment, management and use of community forests in Cambodia, which

are allocated for a renewable period of 15 years by an agreement.

The Protected Area Law (2008) defines the framework of management, conservation and development of protected areas. The purpose of the law is to ensure the management and conservation of biodiversity, and the sustainable use of natural resources in protected areas. It recognizes the right of forest-dependent and indigenous peoples to sustainably use the natural resources, and to reside, within protected areas. The law divides the protected area into four zones, and each zone is defined by its land use and management: core zone, conservation zone, sustainable use zone, community zone. So far, full zonation has only occurred for one national protected area. The law also provides for the establishment of community protected areas (CPAs), which usually cover parts of the sustainable use zone and community zone. The goal of establishing CPAs is to gain the involvement of communities and other relevant stakeholders in the planning, management, monitoring and evaluation of protected areas. Resource users are supposed to benefit from biodiversity conservation and forest protection, livelihood subsistence and the maintenance of cultural and spiritual values. Yet, local people are not allowed to use natural resources for commercial purposes, although they can collect non-timber forest products (NTFP) in traditional ways.

Sub-Decree No. 83 on Procedures of Registration of Lands of Indigenous Communities (2009) specifies the procedures for and categorization of the land to be registered in the name of IPCs, namely residential land, farming land (permanent or shifting cultivation), reserved land for shifting cultivation and future allocation, as well as burial and spiritual forests (up to seven hectares each). Forest land for NTFP collection or waterbodies (e.g., ponds) is not included as a category, thereby excluding important aspects of communities' livelihood base.

Preparations for the formal recognition of customary land rights of IPCs in Cambodia started in 2004 and led to the issuing of first communal land titles in late 2010. From the onset, the main objectives of communal land registration were to preserve and protect the customs, traditions and natural resources of IPCs; improve land use and management in a sustainable manner; enhance livelihood development; and reduce or eliminate land conflicts.

The entire collective land titling process consists of several steps and activities:

Step 1: Self-identification of IPCs with the Ministry of Rural Development (MRD)

Step 2: Recognition of IPCs as legal entities by the Ministry of Interior (MoI)

Step 2.5: Preparation of a preliminary map, showing boundaries and land uses according to the different categories of IPC lands; development of internal rules on the use and management of the land; submission of application for collective titling and issuing of interim protection measures (IPM)

Step 3: Surveying boundaries and issuing the collective land title after public display (30 days) and approval by other ministries such as the Ministry of Agriculture, Forestry and Fisheries (MAFF) and the Ministry of Environment (MoE) for the registration of state land

An interministerial circular on interim protective measures (IPMs) was issued by MoI and MLMUPC in 2011 to further secure the land rights of IPCs. An IPM, which can be issued by the respective provincial governor only after an application for a communal land title has already been accepted by the provincial department of land management, prohibits the sale, lease, encroachment, or transfer of land claimed by IPCs. It also grants IPCs the right to use legal measures to protect their traditional rights.

As of late 2016, 115 IPCs have completed the process of self-identification with MRD, while 113 IPCs have been recognized as legal entities by MoI. Only after this official recognition can IPCs proceed with applications for collective land titles. So far, 45 such applications have been accepted by the provincial departments of land management, 45 IPMs have been issued by provincial governors, but only 14 collective titles have been distributed (five in Ratanakiri, seven in Mondulhiri, two in Kratie). These 14 IPCs represent 6500 people and 1478 families. The areas titled range from 384 to 1766 hectares (ha) per community.

A recent assessment on the adoption of the VGGT in Cambodia has shown that the stipulations in the Cambodian legal framework with regard to formalizing customary land rights are generally in accordance with the guidelines endorsed by the Committee on World Food Security (Yniesta, 2015).

Despite the fact that customary tenure recognition is, in principle, provided for in the Cambodian legal framework, it can only be asserted through a process of formal recognition, clear identification of concerned areas, and titling. Under the current situation in Cambodia, marked by investments in land (medium and large-scale land acquisitions) and internal migration, written and formal recognition of customary land rights can provide some form of protection and enforceable tenure security.



Challenges

The process of communal land titling is complicated, lengthy and expensive. It involves three different ministries (MRD, MoI and MLMUPC) and, in most cases, requires additional approval by MAFF and MoE before the government (Council of Ministers) issues a sub-decree to reclassify these parcels from public state land to private state land. A major problem is the lack of coordination and communication between the ministries. Progress in the issuing of communal titles for IPCs has been slow and remains well below the official target of 10 titles distributed per year from 2013 onwards.

The whole titling exercise takes at least four years, while in practice it can take six years or more. The average costs are more than USD 50 000 per IPC, and are mainly covered by donors and non-governmental organizations (NGOs). Only the final step of surveying and registration of the land is funded by RGC, which provides a budget of USD 300 000 to MLMUPC for titling 10 IPCs per year, based on an estimated average area of 750 ha, and USD 40 per ha in surveying costs.

Any application for collective land titling must be free from land conflicts, which means that any conflicts with neighbouring communities, individuals and ELCs must be settled beforehand. Yet, many severe land conflicts with ELCs are pending, and there are no clear procedures and responsibilities for solving these conflicts. In reality, this requirement is one of the most frequent reasons for non-acceptance of an application. In other cases, applications are rejected because community boundaries remain unclear or the provincial department considers the claimed area to be too large.

This is also the main reason why a GIS-based preliminary map is required as one of the supporting documents for an application, despite the fact such a map is costly to produce and requires GIS capacities. As only an IPC and its elders know their customary use areas, the usual system for verifying claims applied in systematic land registration – requiring at least three witnesses and reliance on social control systems – is not applicable in collective titling.

Land fragmentation through encroachment by external agents, unclear boundaries with neighbours, and informal land sales create considerable conflict between communities and between communities and outsiders. In several cases, IPMs are not fully respected by local authorities and land speculators. All of this has resulted in some IPCs losing their customary land and access to essential natural resources.

At present, the communal land titling does not include large forest areas and there is no system in place to register customary use rights over larger forest lands. Both failing forest protection policies and the allocation of forest lands to development projects as an ELC have caused widespread deforestation and forest degradation.

According to the Land Law, communal and individual titles are rendered mutually exclusive. In practice, an IPC often switches between a communal and individual possession, depending on whether land is actively cultivated or not. The titling process under Directive 01, starting from 2012, formalized individual land tenure rights on (former) state land, forcing members of IPCs to choose between individual titles issued in a relatively short timeframe, or to continue working towards collective titling. This created many additional internal conflicts within IPCs and led to a loss of social cohesion. There is, thus, an ongoing controversy over whether communal and individual land rights should co-exist in a given IPC.

MLMUPC issued an instruction in 2016 to regulate the re-integration of individual titleholders into an IPC collective area and vice versa, which basically describes the procedures to be followed, specifies in which case re-surveying has to take place, and fixes the fees and taxes to be paid. Recent assessments (e.g., CCHR, 2016) have all shown a growing interest in individual titling among IPC villagers due to the option of using individual land titles for mortgage in order to invest in agriculture or to legally sell their land.

Even before the implementation of Directive 01, many IP villagers opted not to join their local IPC when it was first set up. A recent study (CIPO, 2015) in the commune of Busra in Mondulkiri showed that only 42 percent of IPC families in seven villages joined the IPC. The main reasons for not joining the IPC, or for leaving it, include the desire to have individual titles to mortgage their land, or frustrations resulting from the long wait for a collective title. This means that communal land resources that are recognized through the collective titling process are, in some cases, only used and managed by a minority of villagers because communal ownership comprises the right to exclude others. Details on access to communal land resources are supposed to be further regulated by the internal rules of the IPC.

In Cambodia, most IPCs have only been in their present location since the late 1970s. Before the time of the Khmer Rouge, entire villages were often relocated. Studies in Busra found that six IPCs were established between 1975 and 1986, while data from Ratanakiri showed establishment dates for 14 IPCs from 1980 to 2011. Due to the cut-off date (1979) in the Land Law, this means that communities can only exceptionally claim customary rights to old settlement areas and former production zones.

The process of identifying and formalizing customary tenure systems in Cambodia is

highly dependent on the support of donors and the work of NGOs. The technical and procedural requirements – in terms of internal rules development, and mapping indigenous communal land with different types of uses – make it virtually impossible for the community itself to cope with these requirements. Illiteracy among community members is high and increases their dependency on NGOs even further. This dependency can be problematic in the case of a large presence of civil society actors and conflicting information provided. The interaction between representatives of the concerned line agencies (government officials) and communities, as well as their technical capacities, remain limited. NGO staff working with IPCs often also lack communication and technical skills such as data collection on land-use systems and digitizing maps.

Despite the fact that communal land titles are supposed to provide a certain land tenure security for IPCs, these communities often still face land disputes after they have received collective titles. Small and medium land encroachers continue to occupy titled land. Illegal logging still takes place. Larger plots, such as spiritual forests, burial forests and especially reserved land have been difficult to control and protect such as the case of O'rona (documented in CIPO, 2014 and GIZ LRP II, 2015). Only one complaint (O'rona in Mondulkiri) has been taken to the local courts by an IPC, with support from a law firm and with external funding. Of nine IPC with land titles issued by early 2015, five have experienced encroachment by outsiders, either as individuals, groups or in connection with an ELC (GIZ LRP II, 2015). A 2017 study by the Office of the United Nations High Commissioner for Human Rights (UNHCHR) of 10 IPCs in possession of communal titles confirmed once again the high variability of the benefits of communal land titling. While a total of five IPCs claim to have clearly benefited from increased tenure security, the other five have

faced important challenges in terms of land encroachment and/or land sales and would have preferred individual land titles, or are in the process of breaking up their IPC. The fact that IPCs face enormous challenges to defending their collective land rights even after titling shows the deficiencies in the land governance system within the country.

Another key issue is that under communal land registration only the land claimed by community members is registered and the rightful claims of non-IPC members and Khmer living in the same village are disregarded. Nowhere has adjacent land in the direct vicinity of the IP land been systematically registered. Various studies (e.g., Diepart and Sem, 2015) have shown that untitled areas near titled zones underlie increased pressures and suffer from a relative decrease of perceived tenure security.

As gender issues are often insufficiently addressed in the formulation of internal rules and by-laws, access to collectively managed land resources often follow traditional and sometimes discriminating rules for women or prevent women from fully participating in decision-making.



The internal migration of Khmer people to IPCs has increased exposure and connection to infrastructure projects, and the growing land scarcity has resulted in rapid changes in customary land-use practices, most notably a shift away from swidden agricultural systems towards more permanent and cash crop-oriented cultivation. Shifting cultivation practices still exist, but mainly in more remote areas. Knowledge of traditional practices, customs and conflict resolution mechanisms is quickly disappearing.

Under the present legal framework, only an IPC can request formal recognition of its customary rights in the form of collective land titles for selected land-use areas. Yet, Khmer (non-indigenous) communities in rural areas have traditionally used land collectively, following their customary practices and use rights as well. This applies, for example, to shifting cultivation areas of Khmer communities living along the edges of the Cardamom Mountains. There, Khmer people manage numerous fish ponds and small lakes, and engage in NTFP and firewood collection in village areas surrounding the Tonle Sap and in forest communities in Preah Vihear.

Opportunities

There is general agreement that under the given framework conditions, collective titling is still one of the best available options for IPCs to protect their customary lands and natural resources. In impact surveys (GIZ LRP II and Yun Mane, 2015), interviewed communities agreed that the title gave them a basic security that they did not have before, and has helped them to preserve and protect customs, traditions and natural resources in the community, and to improve land use and land management. The communal title provides evidence of ownership, and serves as one of the means to defend their rights in conflicts with encroachers from outside. The 2017 study by UNHCHR highlights that although most villagers still supported the idea of a CLT for their collective land resources, in terms of perceived tenure security most interview partners still ranked an individual title higher than a CLT.

Since the passing of the Land Law in 2001 or the Sub-Decree on Land Registration in IPCs in 2009, realities in Cambodia have changed, capabilities have improved, and important lessons have been learned. Many aspects of customary tenure rights and their recognition are well researched and documented in the Cambodian context. This provides an excellent basis for a thorough review of the applied procedures, processes and, eventually, the legal and regulatory framework for the recognition of customary tenure. This review will need to make use of the VGGT as the international standard in tenure governance.

In theory, the concept of a CPA being allocated to an IPC could form an alternative option for the protection of customary land and its natural resources.



In practice, this is made more difficult by the fact that identified community use zones within the protected areas do not necessarily correspond to the customary land of a particular IPC. Furthermore, the desire of communities to continue shifting cultivation practices, agricultural land use and the exploitation of forest products are not compatible with the objectives of a CPA where the focus is on the conservation of resources. Finally, CPAs are once again examples of delegated management of state land based on jointly agreed on management plans, where decision-making powers and full tenure security of IPCs are limited.

Currently, new laws, such as the draft Environmental Code, a revised Law on Forestry, a revised Fishery Law, and an updated Protected Areas Law are being prepared. All of them touch on important aspects of traditional, collective land use and need to be harmonized so that they define customary use of natural resources and tenure rights for rural communities. Finally, MLMUPC has started a process to streamline and unify its land registry under the new Cambodian Cadastral Information System, which will, for the first time, provide timely and accurate information on all registered land at the central level.

The state land registration process, planned by RGC since 2014, was finally started in 2016. As a first stage, RGC has selected to register ELCs (private state land) and will continue to include other types of state land. This would be a good opportunity for IPCs to claim their use rights over larger forest lands and record these into the land registry system. Where customary land-use areas extend over recently cancelled ELCs, there could be additional opportunities for IPCs to claim back this land. Unfortunately, this option has been negatively impacted by the recent MAFF policy decision to favour reforestation of cancelled ELCs as pulpwood or timber plantations.

Recommendations and ways forward

1. The process of communal land registration for IPCs needs to be streamlined and further improved.

- Ways and means need to be explored to streamline and speed up communal land registration; the target should be that any community can reach the stage of being issued a collective title after a maximum of 24 months. This would first require a broad discussion among all concerned stakeholders on how to speed up and simplify the process within the present legal framework. Thereafter, a complete review and adaptation of the legal framework would be necessary.
- The five land-use categories for which communal titling is currently applicable (residential land, agricultural land, reserved land for swidden and fallow, burial and spiritual forests) need to be reviewed and expanded to include forest land, grazing land, grass-cutting areas, communal lakes, and ponds and bamboo groves. Area restrictions (e.g., to burial grounds and spiritual forests, 7 ha each) need to be reviewed and adapted.
- At present, only residential land and agricultural land are legally registered under the full ownership of the IPC, while reserved land, burial grounds and spiritual forests are registered as private (sometimes even public) state land but placed under community management. In most cases, this involves the issuing of a specific sub-decree to reclassify these parcels from public to private state land, which can be a lengthy process. All land-use categories falling under the full ownership and exclusive management responsibility of the

community should be registered as “communal land” because registration as state land always provides far less tenure security to the IPC. Full ownership rights should be provided to the community for all land categories mentioned in the bullet point above.

- In addition to the land-use categories currently covered by a communal land title, virtually all communities have customary uses in larger forest areas (e.g., for NTFP and firewood collection, resin tapping) or have fishing rights in selected waterbodies. These traditional and sometimes extensive use rights, which are not property rights to the land, need to be registered as legitimate customary rights on the public state land, once this is registered. Under the Law on Forestry (2002), the Land Law (2001) and their related sub-decrees and regulations, all forest land in Cambodia is classified as public state land. Therefore, community forests, NTFP collection and fishing areas should be legally registered as “state land” but under delegated management allocated to IPCs with full use rights.
- Full zonation and land-use planning exercises of all protected areas need to be accelerated. All zones need to be properly identified and mapped as stipulated in the Law on Protected Areas. All identified community zones should then be clearly subdivided and officially allocated by MoE to the local communities living within or adjacent to the protected area for later registration as communal land of each IPC. Wherever possible, CPAs should be established across all identified sustainable use zones, which correspond to the customary land use area of each IPC living in the area.

CPAs should also include parts of the conservation and core zones whenever these are part of the customary tenure area.

- In the future, surveying and titling of communal land needs to be combined with the process of Systematic Land Registration and State Land Registration to form a more inclusive and comprehensive approach. In practice, this would mean not only registering the communal land of a specific IPC in a particular commune, but systematically registering the land of individuals and non-IPC members, other IPCs and the state in areas where applications for collective titling have been submitted and accepted. This will eventually lead to a situation where all of the land located within and surrounding the IPC will be registered. Such an inclusive approach would substantially help to foster tenure security and reduce land conflicts of all sorts.
- When dealing with the situation in each IPC, more flexibility should be applied and comprehensive and neutral information on the various legal options should be provided. Indigenous people should be clearly aware of the advantages and disadvantages of private and communal titles. The overarching principles should follow the concept of Free Prior Informed Consent by all villagers and their preferences for securing their tenure rights. This could include a combination of individual and collective land registration, or an adherence to communal land registration only, depending on the local situation. Opportunities need to be provided for people with individual titles (Directive No. 01) to re-join the IPC or others to leave the IPC and opt for private titles as stipulated by the 2016 MLMUPC instruction. Access rights to any communally registered area by non-members of the IPC, including Khmer villagers, need to be clearly specified.

2. There needs to be customary tenure recognition and communal registration for non-indigenous people.

- Recognition of collective and customary tenure needs to be expanded to non-indigenous communities in Cambodia. Most villages in rural areas and, in particular, forest and fishery communities have a variety of customary tenure systems for pasture land, forests, shifting cultivation areas, collection areas of NTFPs or fishing areas.

Many lowland villages have community land for ceremonies, fairs and funerals. A clear distinction is needed on which areas fall under the property and full management responsibility of the respective community or several communities together, and in which areas (classified as public or private state land) the communities have extensive use rights to specific natural resources under the delegated management model. In the latter cases, all use rights need to be formally registered as a legitimate customary right on the state land title. This would, for example, constitute an option for the official registration of the existing community forests (485 schemes in 2015),

the community fishery areas in Cambodia or CPAs in protected areas (129 CPAs at various stages of approval).

Once customary tenure is no longer restricted to indigenous communities and the corresponding changes have been made to the applicable regulations, communal land registration could become part of the systematic land registration system in all communes and villages across the country. Then, the current requirements to demonstrate ethnicity could be dropped.

In order to further discuss and drive forward the above-mentioned changes, it is advisable to create a dedicated multi-stakeholder group for the revision of the procedures for formalizing customary tenure, including at a later stage, the revision of the legal framework. This group could be chaired and coordinated by MLMUPC and function as a separate new institution.

Before the process of legal review is started, it would be sensible to initiate a pilot exercise on inclusive registration of communal lands in combination with individual parcels and state land in a selected target area. The multi-stakeholder group would coordinate, supervise and review the new approach tested in this pilot area.



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Policy Brief



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