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# Achieving de facto gender equality in land, forest and fisheries tenure

Scaling up the adoption of  
temporary special measures  
in national legal frameworks



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## Foreword

Gender equality is central to the constitutional purpose of the Food and Agriculture Organization of the United Nations (FAO) to achieve food security for all by raising levels of nutrition, improving agricultural productivity and natural resource management, and improving the lives of rural populations. To achieve its goals, FAO supports its Member Nations in taking all appropriate measures, including legal reform, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Gender equality is not only an essential means by which FAO can achieve its mandate, it is also a human right.

The persistence of discriminatory social norms and differential access to economic opportunities and resources largely contributes to gender disparities in food security. The achievement of Sustainable Development Goal (SDG) 1 (No Poverty), SDG 2 (Zero Hunger), SDG 8 (Good Jobs and Economic Growth) and SDG 10 (Reduced Inequalities) is directly dependent on the achievement of SDG 5 (Gender Equality). The COVID-19 pandemic has heightened gender-based inequalities around the world. As the crisis deepens, the economic impacts are felt especially by women and girls who are generally earning less, saving less, and holding more insecure jobs or living close to poverty (United Nations, 2020). Secure tenure rights over natural resources increase women's resilience in the face of health and environmental crises, and are critical to women's empowerment (FAO, 2019a).

Legislation can play a strong part in achieving gender equality. An essential step is to ensure that men and women enjoy equal status and equal rights under the law, and the legislation is not discriminatory, neither in intent nor in effect. However, formal equality has not proved to be sufficient to achieve gender equality in reality – de facto gender equality – because of social norms and perceptions about roles and rights of the genders. Therefore, international law and many national legal systems make use of “temporary special measures” to achieve gender equality in practice. This legal paper explores their use to achieve de facto gender equality with regard to land, fisheries and forests. The paper is aimed at those working in the legal and policy fields at the national level or in international organizations as they work towards gender equality in the sectors regarding these natural resources. The paper may also be a valuable resource for those wishing to advocate for legislative reforms to achieve gender equality.

In line with the pledge to Leave No One Behind as part of the *2030 Agenda for Sustainable Development* and with the goal and objectives of the *FAO Policy on Gender Equality 2020-2030* (FAO, 2020a), this timely paper provides an overview of the use of temporary special measures in national legal frameworks on land, forestry and fisheries as a tool to achieve de facto gender equality. It also considers the role of development partners in supporting the adoption of temporary special measures through the implementation of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT), the monitoring and reporting of SDG legal indicator 5.a.2, and the collection of statistical data on SDG indicator 5.a.1.

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## Acronyms and abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
ASEAN	Association of Southeast Asian Nations
CFS	Committee on World Food Security
CSW	United Nations Commission on the Status of Women
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Cttee	Committee on the Elimination of Discrimination against Women
ESP	Inclusive Rural Transformation and Gender Equity Division (FAO)
FAO	Food and Agriculture Organization of the United Nations
IADB	Inter-American Development Bank
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IIED	International Institute for Environment and Development
Incopesca	Costa Rica Institute for Fisheries and Aquaculture
IOM	International Organization for Migration
UN	United Nations
USCCR	United States Commission on Civil Rights
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WWHR	Women for Women's Human Rights



# 1. Introduction

In March 2020, the United Nations Commission on the Status of Women (CSW) expressed concern in a declaration at the Fourth World Conference on Women that overall, progress on gender equality and the empowerment of women and girls has not been fast or deep enough. In some areas progress has been uneven, and major gaps and obstacles remain, including structural barriers, discriminatory practices, as well as an increasing feminization of poverty. The CSW emphasized that 25 years after the Fourth World Conference on Women in Beijing, no country has fully achieved gender equality and the empowerment of women and girls. Significant levels of inequality persist globally, with many women and girls experiencing multiple and intersecting forms of discrimination, vulnerability and marginalization throughout their life, including *inter alia* rural women, indigenous women, women with disabilities, migrant women, widows and older women.

The growing pressures on natural resources and the impact of climate change continue to impact women's economic and reproductive lives disproportionately and differently from that of men (UN, 2020). In recent years, new challenges to gender equality have emerged globally, most notably due to the COVID-19 pandemic. The economic impacts have been felt especially strongly by women and girls who are generally earning less, saving less, and holding insecure jobs or living close to poverty (UN, 2020). In the agricultural sector,<sup>1</sup> rural women face greater constraints than men in accessing productive resources, services, technologies, markets, financial assets and local institutions, which makes them more vulnerable to the socio-economic effects of the COVID-19 pandemic and the measures to contain it (FAO, 2020b). Insecure tenure rights compound these challenges and require urgent action to mitigate these impacts and improve resilience in the face of future crises (FAO, 2020c).

Women's tenure insecurity puts them at risk of eviction, hampers their agricultural productivity and limits their access to other productive resources and services, including credit and extension. As a result, women producers are more likely to be in a situation of poverty and food insecurity (FAO, 2011; Banerjee *et al.*, 2014). De facto inequality in tenure rights also has multiplier effects on health and safety, poverty and development generally. A study in Ethiopia found that women's lack of control over agricultural assets contributes to the consumption of grain contaminated by fungi or pests by the household (FAO, 2019b). Gender-responsive interventions to strengthen women's tenure rights and decision-making power in the production and sale of agricultural produce could therefore improve food safety and dietary diversity.

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)* stress that to reduce poverty, boost economic growth and promote sustainable rural livelihoods, governments should: a) acknowledge the differences that exist between women and men in access to and control over natural resources; and b) take specific measures to close the gender gap and accelerate the achievement of de facto gender equality. Such a shift requires developing gender-sensitive policy and legal frameworks with a long-term perspective, political commitment, awareness raising and active stakeholder engagement (FAO, 2013). It is also crucial that national dialogue on gender equality identifies men and boys as both actors and beneficiaries of progress on gender equality.

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<sup>1</sup> As per FAO's Constitution, the term "agriculture" and its derivatives include fisheries, marine products, forestry and primary forestry products.

Temporary special measures – or measures that provide preferential treatment to accelerate the realization of gender equality – have a legal basis in Articles 3 and 4 of the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, and countries are regularly reminded of their importance in addressing gender inequalities in practice. While many states have been using temporary special measures to increase women’s participation in the public sphere, countries have yet to consider other areas where gender inequalities still persist, such as in relation to land, forest and fisheries tenure.

Research in this area is scarce, despite the potential that temporary special measures hold for bridging the gender gap in land, fisheries and forest tenure. This legal paper aims to provide a non-exhaustive typology of existing temporary special measures to contribute to the understanding of how this tool can help further the objectives of CEDAW in the land, forestry and fisheries sectors. In particular, it shows the many applications of temporary special measures in the constitution, in laws on equality, in special measure legislation and in sectoral legislation. It uses the concept of ‘tenure rights’ which define and regulate how people, communities and others gain access to natural resources, whether through formal law or informal arrangements. It considers how the rules of tenure determine who can use which resources, for how long, and under what conditions, whether they are based on written policies and laws, or unwritten customs and practices, as described in paragraph 4 of the VGGT. Although it is beyond the scope of this paper to assess the effectiveness of the temporary special measures highlighted below, it considers the role of gender-disaggregated data in guiding the identification of the most appropriate type of special measure in a domestic context and in measuring their impact.

This paper is structured as follows: Section 2 considers the obligations of states in relation to gender equality and the adoption of temporary special measures, and the work of the CEDAW Committee in clarifying and expanding the concept of temporary special measures. In particular, it shows how the General Recommendations of the Committee have established a clear link between temporary special measures and the achievement of gender equality in the ownership and control of natural resources. Section 3 explores a range of national approaches to the use of temporary special measures in legislation, from constitutional recognition, the adoption of framework laws on gender equality and non-discrimination, to their integration into sectoral legislation applicable to land, forests and fisheries. The section highlights some of the measures that countries have adopted to show how their inclusion into sectoral legislation can effectively target de facto inequalities in tenure rights over some key economic resources. It discusses state compliance with CEDAW’s Articles 3 and 4 and shows that generally, countries should make more systematic use of this tool to bridge the gender gap in land, forest and fisheries tenure. Finally, Sections 4 and 5 consider the role of development partners in supporting the adoption of temporary special measures, including through data collection and Section 6 concludes the findings of the paper.

## 2. State obligations in relation to gender equality and temporary special measures

### 2.1. Non-discrimination and the achievement of equality in practice

Under international law, states have the legal obligation to eliminate gender-based discrimination, in line with Article 2 of CEDAW, and to take all appropriate measures in the political, social, economic and cultural fields to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (Article 3). As described in more detail below, under CEDAW, States Parties have two types of legal obligations of equal importance, and equally compulsory. The first obligation relates to the negative legal obligation not to discriminate on the basis of gender (Article 2). The second obligation is the positive legal obligation to promote and achieve de facto gender equality (Articles 3 and 4). While the first obligation merely requires states to refrain from discriminating on the basis of sex, the second obligation requires them to take proactive steps in order to achieve de facto gender equality. When applied to the context of tenure rights, these obligations translate into:

1. A duty not to create or perpetuate any “distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” (Article 1, CEDAW); and
2. A duty to acknowledge and address the special needs of women to achieve de facto gender equality in the ownership or control of natural resources. Temporary special measures are a tool that states are encouraged to use in order to achieve de facto (or substantive) equality between men and women, in all aspects of public and private life.

### 2.2. Gender equality and tenure rights

Human rights instruments have established a number of fundamental rights, for the benefit of everyone, with no distinction on the basis of sex. The right to property is protected in human rights law through universal and regional treaties, as well as non-legally binding instruments. Among them, Article 17 of the *Universal Declaration of Human Rights* proclaims that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property. Article 13 of the *Convention relating to the Status of Refugees* requires States Parties to accord to a refugee treatment that is “as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.” In their legal opinion, Golay and Cismas (2010) explain that owing to the political divides that surrounded the negotiations of the *International Covenant on Civil and Political Rights (ICCPR)*

and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* between the Eastern and Western blocs and between the North and the South, these instruments do not refer to property except in the context of non-discrimination (Articles 2.1, 24.1 and 26, ICCPR; Article 2.2, ICESCR). Article 15 of CEDAW requires States Parties to give women equal rights to conclude contracts and to administer property. In addition, states parties to CEDAW must take appropriate measures to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration (Article 16.1.h).

Regionally, the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)* protects property and recognizes that every natural or legal person is entitled to the peaceful enjoyment of their possessions (Article 1). In the Americas, the *American Convention on Human Rights* states that everyone has the right to the use and enjoyment of their property (Article 21(1)). In Africa, the *African Charter on Human and Peoples' Rights* guarantees the right to property (Article 14). The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* contains provisions to protect the property rights of married women (Article VI), those of widows (Article XX), and requires ratifying states to promote women's access to and control over productive resources such as land and to guarantee their right to property (Article XIX). In addition, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa* requires ratifying states to put in place measures to protect older women against abuses related to property and land rights, and to protect their right to inheritance (Article 9). In Asia, the right to property is recognized by the *Association of Southeast Asian Nations (ASEAN) Human Rights Declaration* (Section 17).

While there is no universally agreed definition of the right to property, regional courts have gradually fleshed out the content and scope of the right. According to Golay and Cismas (2010), the right to property includes the right to peacefully enjoy property, and can include existing possessions or assets acquired by law, or claims which raise a legitimate expectation of obtaining effective enjoyment.

In domestic legislation, the right to acquire, the right to use, the right to exclude and the right to transfer are generally accepted as components of the right to property (Sprankling, 2014). Ownership of natural resources may encompass all of these rights or be more restrictive depending on national law. Viet Nam's *Civil Code of 2005* illustrates this point by providing a detailed description of the content of the right to ownership. It includes the right to possession defined as the right to keep and manage the property (Article 182), the right to use defined as the right to exploit the property and to enjoy the yields and profits derived from it (Article 192) and the right to dispose of property defined as the right to transfer property ownership rights or to renounce to them (Article 195).

Historically, women have not benefitted equally with men from the right to property. Yet, it is important to recall the texts of the *Vienna Declaration and Programme of Action of 1993*, asserting that all human rights are universal, indivisible, interdependent and interrelated (Section 5). What's more, the human rights of women and of the girl-child are "an inalienable, integral and indivisible part of universal human rights" (Section 18). As such, women's rights to land and property must be understood and addressed alongside other civil, cultural, economic, political and social rights. This formulation was inserted in the VGGT to remind us that the governance of tenure of land, fisheries and forests should not only take into account rights that are directly linked to access and use of land, fisheries and forests, but also all civil, political, economic, social and cultural rights (Section 4.8).

Under Article 23(4) of the ICCPR, States Parties are required to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In *General Comment No. 28*, the Human Rights Committee clarified the scope of this Article in relation to property rights. To fulfil their obligations under this article, States Parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to (*inter alia*) the ownership or administration of property, whether common property or property in the sole ownership of either spouse (CCPR, 2000). Furthermore, States Parties “should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary” (CCPR, 2000, para. 25).

The *Indigenous and Tribal Peoples Convention, 1989 (ILO Convention 169)* laid out the principle of non-discrimination both as a group and on the basis of sex. Under the Convention, Indigenous and tribal peoples are to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination (Article 3(1)). The provisions of the Convention are to be applied without discrimination to male and female members of these peoples (Article 3(2)). This Convention is an important landmark as it guarantees Indigenous Peoples a right to property equal to the one that non-members of indigenous groups enjoy, as well as freedom from discrimination on the basis of sex. It also recognizes the right to retain indigenous customs and institutions, provided that these are not incompatible with internationally recognized human rights (Article 8(2)). Their right to property includes the right to ownership and possession over the lands which they traditionally occupy, and the right of use for subsistence and traditional activities (Article 14).

Human rights instruments place various obligations on ratifying states to respect, protect and fulfil these rights. It is their responsibility to undertake the necessary legal reforms to guarantee gender equality in the right to own or control natural resources. To achieve this, states should consider the adoption of temporary special measures, in accordance with CEDAW.

### 2.3. What are temporary special measures?

Temporary special measures have been in use in some countries since the 1960s.<sup>2</sup> In national legal frameworks temporary special measures may be referred to as “affirmative action”, “positive action”, “positive measures”, or “positive discrimination”. The text of the CEDAW Convention does not provide a definition of temporary special measures. It does however, acknowledge that they entail introducing separate or unequal standards for the purpose of accelerating de facto equality between men and women.

In 1995, the *Beijing Declaration and Platform for Action* committed countries to take measures to ensure women’s equal access to and full participation in power structures and decision-making. In particular, in signing this Declaration countries committed to achieve gender balance in governmental bodies and committees, in public administrative entities, and in the judiciary. This was to be done by *inter alia* setting specific targets and implementing measures to substantially increase the number of women through the use of positive action when necessary, in order to achieve equal representation of women and men. While the Beijing

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<sup>2</sup> One of the most oft-cited definitions of affirmative action was developed by the United States Commission on Civil Rights in the United States of America (see Section 2.4 of this paper).

Platform provided clear guidance on how to strengthen women's participation in decision-making and representation in public bodies, it is much less detailed on the topic of gender inequalities in other aspects of public and private life, such as the ownership and management of natural resources. The Platform called on governments, the international community, civil society and the private sector, to take 'strategic action' on this critical area of concern. This was to be carried out through the elimination of gender-based discrimination in laws pertaining to access to ownership and control over land and other forms of property, credit, inheritance, and natural resources (para. 165 [e]). It also encouraged countries to establish strategies and mechanisms to increase the proportion of women involved – particularly at grass-roots levels – as decision makers, planners, managers, scientists and technical advisers and as beneficiaries in the design, development and implementation of policies and programmes for natural resource management and environmental protection and conservation (para. 254 [b]).

The CEDAW Committee (2004) clarified the obligations of states in relation to temporary special measures in its *General Recommendation No. 25*, where the Committee noted that the position of women would not be improved as long as the underlying causes of discrimination were not effectively addressed, and measures adopted towards a *real* transformation of opportunities, institutions and systems (para. 10). The Recommendation highlights that States Parties are obliged to adopt and implement temporary special measures "if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality" (para. 24). On this occasion, the Committee reminded parties of their legal obligation to respect, protect, promote and fulfil this right to non-discrimination and to ensure the development and advancement of women, in order to improve their position under the law (de jure) as well as in practice (de facto) (para. 4). The Committee clarified that this legal obligation is threefold: first, parties must ensure that there is no direct or indirect discrimination against women in their legal framework, and that they are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises, or private individuals both in the public and the private spheres; second, parties must improve the de facto position of women through concrete and effective policies and programmes. These first two obligations entail a third obligation to address the persistence of gender-based stereotypes in social structures and institutions (para. 7). To comply with these obligations, temporary special measures should be a part of any strategy by states to accelerate the equal participation of women in the political, economic, cultural, civil or any other field.

More recently, in its *General Recommendation No. 34 (2016) on the rights of rural women*, the Committee reminds parties that they should make use of temporary special measures as a way to address discriminatory stereotypes, attitudes and practices that impede rural women's rights to land and natural resources and to achieve substantive equality (de facto) in relation to land and natural resources (para. 57). This encouragement was reiterated in *General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change* to achieve the equal participation of women in all decision-making and development planning relating to disaster risk reduction and climate change (para. 36 [a]).

While the Committee insists that special measures should be 'temporary', according to *General Recommendation No. 25 (2004)*, the actual duration and application of special measures can stretch over a long period of time, and only be discontinued when their intended results have been achieved (para. 20). The Committee does not however, recommend a minimum or maximum duration for special measures to be applied. Similarly, the Committee has left the definition of the term 'measure' deliberately open ended to encompass a large number of

approaches. They include legislative, executive, administrative and regulatory instruments, as well as *inter alia* the allocation and/or reallocation of resources, preferential treatment and quota systems (para. 22). They should be included in land-related policies, laws and programmes and be supported by targeted allocation of resources to close the gender gap in land ownership or control (ADB, 2012).

### 2.3.1. Are temporary special measures discriminatory?

The legality of temporary special measures has on occasion been questioned in national jurisdictions, on the grounds that the difference in standards that they create violates the provisions on non-discrimination in the constitution. Affirmative action was first used in the United States of America to overcome obstacles to equal employment opportunity in the 1960s. *Executive Order 10925* instructed federal contractors “to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin” (Section 301(1)). It was later defined by the United States Commission on Civil Rights (USCCR) as “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future” (USCCR, 1977). The introduction of preferential treatment first requires an acknowledgement by governments that particular groups within the broader population face unique challenges in spite of constitutional and legal protections.

Such an approach is at odds with the “egalitarian” tradition embodied by the French civil law system, according to which the principle of equality requires absolute egalitarian treatment of people (Levade, 2004). However, in response to social demands the French Constitutional Council has had to stretch the interpretation of the principle of equality on several occasions, gradually instituting a change from equality as a principle to equality as an objective (Levade, 2004). In particular, the Constitutional Council considered the constitutionality of a law relating to the fight against exclusions and recognized in *Decision No. 98-403* that equality “does not prevent the legislature from giving support to certain categories of persons with respect to special needs, most notably, to better the conditions of life of particular categories of persons” (Para. 8). In the United Kingdom, the *Equality Act of 2010* introduced the concept of “positive action” to protect the right to equality of people who share “protected characteristics.” These include age, disability, gender reassignment, marriage and civil partnerships, pregnancy and maternity, race, religion or belief, sex, and sexual orientation (Section 4). Section 158 provides a general legal basis for the use of positive action as a means to enable or encourage persons who share the protected characteristics to overcome or minimize a disadvantage connected to these characteristics. It may also be used to meet the specific needs of people who share the protected characteristics, or to enable or encourage persons who share the protected characteristics to participate in an activity where their representation is disproportionately low. This gradual shift illustrates the necessity for legal systems to adapt to changing social perceptions and to craft appropriate legislative measures capable of addressing the persisting inequalities in society.

Ratifying states that have not submitted reservations to CEDAW Article 3 are required to take all appropriate measures in the political, social, economic and cultural fields to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Temporary special measures are not considered discriminatory under the Convention and states are encouraged to make use of them to achieve their treaty obligations.



## 3. National approaches to temporary special measures

### 3.1. Temporary special measures in constitutional provisions

The prohibition of discrimination on the basis of sex appears in most constitutions, often as an addendum to the right to equality. Such prohibitions are in line with CEDAW's Article 1 and the obligation that it puts on states not to discriminate on the basis of sex. A prohibition, however, should be supplemented by a commitment to achieving gender equality in practice, as stated in Articles 3 and 4 of the CEDAW. A constitutional provision that allows the adoption of "temporary special measures" to advance equality in areas where women cannot exercise their rights or benefit from legal protections on the basis of equality with men due to the persistence of traditional and cultural practices – although not a sufficient guarantee – can help countries fulfil this obligation.

It is important to note however, that not all constitutional provisions serve the same purpose, or carry the same legal strength. Some provisions may just be generic and act as a stepping-stone towards the adoption of more specific special measures in national legislation. In this case, the provision is intended to provide a legal basis for the subsequent adoption of temporary special measures in legislation. Other constitutional provisions contain substantive (or specific) special measures that are directly applicable in the legal system.

Generic constitutional provisions usually serve to establish temporary special measures as non-discriminatory and allow the state to overcome any barriers in public opinion linked to the interpretation of the non-discrimination provisions in the constitution. For instance, the *Constitution of the Kingdom of Thailand* provides that "Measures determined by the State in order to eliminate an obstacle to or to promote persons' ability to exercise their rights or liberties on the same basis as other person or to protect or facilitate children, women, the elderly, persons with disabilities or underprivileged persons shall not be deemed as unjust discrimination under paragraph three" (Paragraph 4, Section 28).

Historical discrimination may sometimes be used as a justification for the adoption of such measures, such as in Ethiopia and Kenya. Article 35(3) of the *Constitution of the Federal Democratic Republic of Ethiopia* grants women the right to affirmative measures to remedy the historical legacy of inequality and discrimination suffered by them. The purpose of these measures is to provide special attention to women to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions. In Kenya, Article 27(6) of the *Constitution of Kenya* requires the state to take measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Other countries have chosen to include substantive special measures in their constitutions, most often in the form of quotas. The *Constitution of Nepal* provides both a legal basis for the adoption of "special provisions" for the protection, empowerment or advancement of the women socially and culturally" (Article 18(3)) and requirements for the representation of women in Municipal (Articles 216(4) and 223(3)), District (Articles 220(3)), and Village

(Article 223(3)) assemblies. These assemblies have decision-making powers over farming and livestock, agriculture production management, livestock health, and cooperatives, as well as the conservation of watershed, wetland and wildlife which all have an important impact on women's livelihoods, health and well-being (Schedule 8). In addition, the Constitution created a National Women's Commission to *inter alia* develop gender policies, and monitor the implementation of laws and respect for women's rights (Article 253(1)). The Commission also has the power to establish offices in provinces. Although this isn't a legal requirement, it may facilitate the implementation of gender policies and legislation in specific parts of the country.

Whatever their preferred approach, countries of different legal traditions are gradually giving constitutional recognition to temporary special measures to achieve de facto equality. These recognitions are context-specific and the rationale behind their adoption varies greatly across the world. In Ethiopia and Kenya, the introduction of affirmative action follows a logic of reparation for historical wrongs, whereas in Ecuador, the provisions on temporary special measures accept that inequalities across society may exist regardless of historical injustices and offer a pathway to address them.

Article 11(2) of the 2008 revised *Constitution of Ecuador* now encapsulates all three pillars of equality by: a) granting all individuals equality of rights and opportunity; b) prohibiting discrimination on the basis of sex; and c) mandating the state to adopt measures of affirmative action in favour of rights holders who find themselves in a situation of inequality. This Article provides a foundation for the adoption of targeted temporary special measures in sectoral legislation. Ecuador's *Organic Code of Production, Commerce and Investment of 2011* contains policy measures for the entrepreneurial development of micro, small, and medium size businesses, and the democratization of production. In particular, as part of its commitment to protect family and community agriculture as the guarantors of food sovereignty, it mandates the state to adopt specific policies to eradicate inequality and discrimination of women producers, in regard to access to the factors of production (Article 57). Although these provisions in the Organic Code remain non-actionable policy commitments, they provide a foundation for the identification of the specific barriers that put women at a disadvantage in different sectors of activity and for the adoption of appropriate mitigating measures by the state.

### 3.2. Temporary special measures in laws on equality and non-discrimination

Another common approach to temporary special measures is to include them in stand-alone laws on equality and non-discrimination. These laws may be gender-specific or aim to tackle the discriminations faced by different segments of the community. Depending on the legal system, they may be taken in pursuance of a constitutional provision on preferential treatment or provide a legal basis of their own. Here again, their content may be general or specific. In the former case, more legal or administrative steps may be required to give effect to the provisions through the adoption of specific special measures. Selected national approaches illustrating the above-mentioned considerations are given in the example boxes below.

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**Equality and non-discrimination:  
National approaches**

**North Macedonia** – The *Law on Equal Opportunities for Women and Men* is a stand-alone, gender-specific legal instrument, adopted for the purpose of overcoming any unfavourable social status of women and men, resulting from a systematic discrimination or structural gender inequality resulting from historical and socio-cultural circumstances (Article 7(1)). It supports the use of special measures for the purpose of *inter alia* eliminating gender-based barriers, and achieving equality of treatment, participation, and social status (Article 7(2)). It provides a legal basis for the promotion of equal representation in all bodies and on all levels in the field of legislative, executive and judiciary authority. Furthermore, special measures may be used to strengthen participation in local government, and it also encourages the introduction of incentives or special advantages to women for the purpose of eliminating the circumstances that cause unequal distribution of social goods and resources (Article 7(3)). These could include natural resources such as land, although the law does not specify the meaning and scope of these social goods and resources. The bodies of the legislative, executive and judiciary authority, and the local self-government units, have the responsibility of adopting these measures through the preparation of a plan of implementation which requires the approval from the Ministry of Labour and Social Policy (Article 8).

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**The Philippines** – The *Republic Act No. 9710 (the Magna Carta of Women)* provides a definition of “gender equity” which refers to the policies, instruments, programmes, services, and actions that address the disadvantaged position of women in society by providing preferential treatment and affirmative action (Section 4). This instrument translates the legal provisions of CEDAW into the Philippine’s context. As such, it requires the government to take all measures, including temporary special measures, in all aspects of social, political and cultural life and in different sectors of the economy. It applies to women who are *inter alia* small-scale farmers and rural workers, fisherfolk, workers in the formal and informal economy, migrant workers, and Indigenous Peoples. While these provisions provide a strong foundation for the achievement of de facto gender equality, they are not actionable until the state takes the required legislative, regulatory or administrative steps to give them binding force.

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### 3.3. Stand-alone temporary special measures legislation

While stand-alone legislation on gender equality and non-discrimination may include generic or specific temporary special measures, this type of legislation consists in and of itself in a special measure. Examples include the creation of special funds for women’s empowerment and to strengthen women’s access to productive resources. For the purpose of this paper, temporary special measures legislation that deals specifically with women’s access to land is addressed in Section 3.4.1 on land legislation.

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**Stand-alone temporary special measures legislation:  
National approaches**

**Colombia** *Law 731 of 2002 by which regulations are dictated to favour rural women*, gives female-headed households in rural areas preferential access to land (Article 25) and to the Agricultural Guarantee Fund (Article 9).

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**Mali** – The *Law No. 2012-002 establishes a Support Fund for Women's Empowerment and Children's Well-being and Development*. The Fund's objective is to develop women's entrepreneurship, to improve women's agricultural productivity and to strengthen women's organizational and management skills (Article 2). The Fund is replenished by regular contributions from the state, local governments, technical and financial partners, and by interests charged on loans to women (Article 3). Mali's *Decree No. 2012-083-P-RM* sets out the operational modalities of the Fund (Article 3). It finances programmes and activities that *inter alia* facilitate women's access to markets, and provide support with the transformation, labelling and management of agricultural produce.

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**Ethiopia** – *Proclamation No. 240/2001 for the establishment of the Ethiopian Women's Development Fund*. This Fund provides financial, material and technical support to income generating activities run by organized women groups, as well as financial and technical support, information, education and communication services to raise awareness (Article 4).

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**Kenya** – *The Kisumu County Enterprise Fund Act (2018)*, gives preferential access to loans to women who operate or intend to operate a micro or small enterprise (Article 10.1), including in the farming sector. In addition to granting loans or credits, the fund also provides training and skills development, technical assistance in product and market development and facilitates technology acquisition, adoption and utilization (Article 4.3).

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**Honduras** – *Regulation No. 14-2018* sets up a National Solidarity Credit Program for Rural Women. Its objective is to promote access to productive activities, and foster the economic and social development of organized women producers in rural areas, for activities in *inter alia* the agriculture and forestry sectors but also to women in the informal sector for the development of crafts (Article 7).

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**Cabo Verde** – In 2020, the country adopted *Resolution No. 139/2020 establishing a Micro Entrepreneurship Promotion Programme*. The objective of the programme is to encourage micro entrepreneurship and contribute to the economic inclusion of women through self-employment and entrepreneurship. It gives priority access to credits for women who meet certain criteria (Article 16.2).

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These examples of stand-alone instruments recognize the specific barriers that women may face in accessing productive resources and in engaging in income-generating activities, and facilitate the allocation of financial resources to strengthen women's status as agricultural producers and entrepreneurs.

### 3.4. Temporary special measures in sectoral legislation

The special measures in this section describe specific legal provisions that provide preferential treatment to women with a view to strengthening gender equality in the agriculture, forestry and fisheries sectors. The desk review shows some similarities in the types of temporary special measures used to strengthen gender equality in land, forest and fisheries tenure. This can be explained by the fact that women who engage in these sectors all require secure tenure rights for their livelihoods and food security. They tend to give preferential treatment to women regarding access to financial resources, training and representation in administrative bodies.

#### 3.4.1. Temporary special measures in land tenure legislation

Land is the most important asset for households who depend on agriculture for their livelihoods (FAO, 2011). Land can generate income directly or be used as collateral to access

financial resources and extension services or join producer organizations (FAO, 2018). The ownership and control over land is critical for poverty reduction, food security, inclusiveness, and overall sustainable development objectives in both rural and urban settings. This paper follows the definitions contained in the reporting methodology for SDG indicator 5.a.2, which defines “land ownership” as a legally recognized right to acquire, to use and to transfer land, and “control over land” which is the ability to make decisions over land. Land ownership may include rights to make decisions about how the land should be used, including what crops should be planted, and the financial from the sale of crops (FAO, 2018). However, it is essential to acknowledge the importance of access rights beyond ownership such as leasing, sharecropping, or acquisition through adverse possession or prescription. Equally essential is the formal recognition of customary systems of land tenure in general law, which can provide use and control rights to communities. To protect gender equality in these customary systems, the recognition should be accompanied by provisions granting explicit protection of women’s rights to land (FAO, 2018).

To understand the rationale behind the adoption of temporary special measures in land ownership and control, two preliminary observations must be made. First, even where formal legislation is non-discriminatory, in practice socio-cultural practices still prevent women from owning or controlling land on an equal basis with men. Second, countries have different political, legal and historical circumstances that have shaped land rights differently resulting in unequal ownership and control of land.

Target 5.a of the SDGs recognizes the importance of land ownership and control by women and encourages states to “undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources, in accordance with national laws.” To monitor this Target 5.a., in 2014 FAO proposed two indicators which have been included in the 2030 Agenda. These indicators work together to: a) help countries identify gender disparities in land ownership and control and guide the adoption of temporary special measures; and b) monitor the impact of legal measures on land ownership and control. These two indicators are:

**Indicator 5.a.1.** *(a) Proportion of total agricultural population with ownership or secure rights over agricultural land, by sex; and (b) Share of women among owners or rights-bearers of agricultural land, by type of tenure.*

**Indicator 5.a.2.** *Proportion of countries where the legal framework (including customary law) guarantees women’s equal rights to land ownership and/or control.*

The inclusion of Indicator 5.a.2 acknowledges that greater equality in the ownership and control of land contributes to economic efficiency and has positive multiplier effects for the achievement of a range of other SDGs including poverty reduction (Goal 1), food security (Goal 2) and the welfare of households, communities and countries (Goals 3, 11 and 16, among others). FAO, as the custodian agency for this indicator, developed a reporting methodology in the publication *Realizing women’s rights to land in the law*, which provides guidance to national lead agencies in the screening of legislation against the six proxies used to report against the indicator. The six proxies are:

- **Proxy A:** Is the joint registration of land compulsory or encouraged through economic incentives?

- **Proxy B:** Does the legal and policy framework require spousal consent for land transactions?
- **Proxy C:** Does the legal and policy framework support women's and girls' equal inheritance rights?
- **Proxy D:** Does the legal and policy framework provide for the allocation of financial resources to increase women's ownership and control over land?
- **Proxy E:** In legal systems that recognize customary land tenure, does the legal and policy framework explicitly protect the land rights of women?
- **Proxy F:** Does the legal and policy framework mandate women's participation in land management and administration institutions (FAO, 2018)?

Importantly, Proxies D and F are intended to facilitate the implementation of CEDAW's Articles 3 and 4 by encouraging and monitoring the adoption by states of temporary special measures to strengthen gender equality in land ownership and control. Since its endorsement by the Inter-agency and Expert Group on SDG Indicators in November 2017, the indicator 5.a.2 was upgraded to TIER II and countries have begun to submit their reporting questionnaires.

Mindful of the need to address the de facto gender gap in land ownership, some countries have introduced legal provisions that provide preferential treatment to women in access to land. Below are some examples of approaches taken by countries in national legislation.

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#### **Allocation of financial resources to increase women's ownership and control over land: National approaches**

**Spain** – the *Law No. 5/2019 on agrarian structures of the Valencian community* gives preferential treatment in access to land to women and young people who engage in an agricultural activity (Article 3.d). The allocation of land is facilitated by a Land Network (Red de Tierras) which acts as a land fund, centralizing data related to the supply and demand of plots with an agricultural purpose (Article 4.10).

**Nicaragua** – In 2010, the country established a Fund under *Law No. 717 for the Gender-Equitable Purchase of Land in favour of Rural Women*. It provides facilitated access to financial resources and gives priority to women who are heads of households and have low economic resources. The objectives of the Fund are to *inter alia* finance the acquisition of properties in the rural sector, with the objective of establishing a land bank, to be awarded as a mortgage guarantee and with a gender perspective, to poor women in the rural sector, taking into consideration their special state of economic vulnerability; to promote the empowerment of women in the rural sector by becoming owners of a means of production that guarantees the economic and food security of women and their family; and to strengthen and expand the rural production system, thereby contributing to efforts to reduce poverty and extreme poverty, especially in the countryside. The Fund is regulated under *Decree No. 52* and replenished by the Annual General Budgetary Law of the Republic, but it is subject to the availability of existing budgetary resources in the corresponding annual periods (Article 1-3(1)).

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**China** – The *National Programme for Women’s Development* contains a financial commitment to women’s development, whereby governments at all levels are required to incorporate the required funding for the implementation of the Programme into their budgets, intensify funding support, and gradually increase it as the economy grows (Section 16.4). The Programme for 2011-2020 aims to *inter alia* ensure rural women’s equal access and right to contracted land management (Section 3.7) and to support the development of women in poor and ethnic minority areas. Although not incorporated into law, this Programme and its financial commitments are binding on governments at all levels. Indeed, it is classified as secondary legislation as it is issued by the State Council which gives it binding force. It was adopted by the Executive Meeting of the State Council presided by the Premier and was issued in the name of the State Council, a process which indicates that the document is an administratively-binding decision. It is enforceable with regards to both central ministries and lower-level governments.

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**Costa Rica** – Under *Executive Decree 41086*, rural development plans must include measures to improve the situation of the most vulnerable (Article 28), which may include women (Article 216) and allocate resources for the implementation of such measures. It also provides that women should be prioritized in the allocation of land (Article 87).

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**Rwanda** – The legal framework ensures women’s representation in various bodies involved in land management and adjudication. Specifically, *Law No. 53/2010* requires that 30 percent of the board of directors of the Rwanda Natural Resources Authority are women (Article 6). Similarly, *Presidential Order No. 54/01* requires that 30 percent of the members of Land Commissions are women (Article 2). In dispute resolution, *Law No. 37/2016 determining organisation, jurisdiction, competence and functioning of an Abunzi Committee* requires that at least 30 percent of members of the Abunzi Committee are women (Article 6). Abunzi Committees are responsible for conciliating parties involved in disputes under its jurisdiction, which includes movable and immovable assets under a certain value set out by the Law (Article 10(1)).

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Legal provisions in relation to Proxy F (women’s participation in land management and administration institutions)<sup>3</sup> are more common in national frameworks. This may be explained by the fact that quotas have been in use for longer than other temporary special measures and is a more commonly accepted form of preferential treatment.

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### **Women’s participation in land management and administration institutions : National approaches**

**South Africa** – The *Traditional Leadership and Governance Framework Act, No. 41 of 2003*, requires that at least one third of the members of traditional councils are women (Section 3.b).

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**The Philippines** – The *Indigenous Peoples’ Rights Act 1997 (Republic Act No. 8371)* recognizes the rights of ownership and possession of Indigenous Cultural Communities and Indigenous Peoples to their ancestral domains (Chapter III). The Act creates the National Commission on Indigenous Cultural Communities/ Indigenous Peoples (NCIP) established as the primary government agency responsible for the formulation and implementation of policies, plans and programmes to promote and protect the rights and well-being of Indigenous Cultural Communities and Indigenous Peoples, and the recognition of their ancestral domains as well as the rights thereto (Section 38). At least two of the seven commissioners must be women (Section 40).

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<sup>3</sup> The examples cited in this section have not necessarily been officially communicated by countries and are for information purposes only.

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**Uganda** – The *Land Act* creates the Uganda Land Commission whose function is to *inter alia*, hold and manage any land in Uganda which is vested in or acquired by the Government (Section 49). It is made up of a chairperson and four members appointed by the President, at least one of whom must be a woman (Section 47). The Act also establishes District Land Boards which operate independently from the Uganda Land Commission but must take into account national and district council policy on land. Its primary function is to hold and allocate land in the district which is not owned by any person or authority and facilitate the registration and transfer of interests in land (Section 59). At least one third of the members of the District Land Boards must be women (Section 57.3). Land committees may be appointed by a District Land Board at subcounty or division level to assist in an advisory capacity on matters relating to land, including in ascertaining rights in land (Section 64.7). Similarly to District Land Boards, land committees are made up of a chairperson and four members, at least one of whom must be a woman (Section 65.2).

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In the agricultural sector more broadly, examples of temporary special measures can be found in national legislation for the purpose of increasing women’s opportunities to access education and training programme, credits, and ownership of land. Below are some examples.

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#### **Temporary special measures in the agricultural sector: National approaches**

**Republic of Korea** – The *Framework Act on Agriculture and Fisheries, Rural Community and Food Industry* requires the state and local governments to formulate and implement policies for agriculture that promote the status of women farmers through training and access to decision-making (Article 27).

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**Mexico (Zacatecas)** – The *Law for Sustainable Comprehensive Rural Development of the State of Zacatecas* provides for the allocation of micro-credits for women who set up small businesses (Article 89(IV)).

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**Nepal** – The *Fiscal Ordinance of 2013* provides for the reduction of the land registration fee at the rate of 30 percent in rural areas if land is registered in the name of a woman. Additionally, the joint registration of land in the name of both the husband and the wife only incurs a nominal fee of NPR 100. Since 2006, the Government of Nepal has regularly increased the percentage of tax exemption for land transferred to a woman, from 10 percent to 25 percent in 2009. These measures have contributed to advancing women’s ownership of land (FAO, 2014) but data from the Central Bureau of Statistics show that the percentage of land owned by women only increased by 8 percent over the period 2001–2011 (IOM, 2016).

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### **3.5. Temporary special measures in forest legislation**

Women’s livelihood and employment in the forest sector is largely dependent on their access to and rights over forest resources. Just as for land tenure, these rights are determined by an array of statutory and customary laws, as well as socio-cultural norms. The forest sector is often governed by statutory legislation in conjunction with formal or informal customary systems of land and forest tenure. The lands on which forests are found may be under the control of traditional leaders such as chiefs, family heads or clan heads who may have formal or informal tenure rights over these resources. When the formal and informal rules that determine the access, use and control over forest resources are discriminatory, they can prevent women and men from benefiting equally from the social, economic and environmental opportunities

provided by forests. Women in particular may be restricted in their ability to participate in decision-making processes, either due to exclusion on the basis of sex or as a result of their role as caregivers, their limited mobility, or lower level of education. Despite these barriers, many women act as rural entrepreneurs in the informal forestry sector and play an important role in value-added activities. Evidence shows that strengthening gender equality in forest tenure rights has a ripple effect on access to economic opportunities, income generation, sustainability, and food security and nutrition, which benefit the community as a whole (Aguilar, Quesada-Aguilar and Shaw, 2011). In addition, artisanal and industrial timber value chains offer opportunities for women to engage in income generating activities. The engagement of women in the legal production and trade in timber, and in activities that reduce emissions from deforestation and forest degradation such as REDD+, can contribute to national efforts towards sustainable forest management and the achievement of broader sustainable development objectives, such as poverty alleviation, food security and climate change mitigation.

Temporary special measures in forest-related legislation are varied but they tend to mirror those used in land legislation. Typically, these measures consist in giving preferential treatment to women, or women engaged in specific types of forestry activities in setting up an activity or accessing funds. Another frequent type of temporary special measure is the requirement for women to be part of the membership of forest management bodies. Below are some samples of temporary special measures in forest-related legislation.

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#### Temporary special measures in forest-related legislation: National approaches

**Guatemala** – *Resolution No. JD.04.28.2015* gives priority to individual female holders in the certification of projects carried out as part of a Forestry Management Plan (Article 8). In addition, the Resolution creates a Community Forestry Fund for the development of community forestry practices. The Fund provides resources for a number of activities, including the implementation of training and extension programmes for projects which prioritize the participation of women’s groups for the conservation and sustainable management of their forests (Article 44(b)).

**Liberia** – Under the *Community Rights Law with Respect to Forest Lands*, at least one member of the Community Forestry Management Body, who manages day-to-day community forestry resources, must be a woman (Section 4.2(a)).

**Ghana** – Under the *Forestry Commission Act*, the membership of the Forestry Commission must also comprise of at least one woman (Section 4(1)(e)).

**India** – The *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act* contains requirements for the representation of women in forest-related institutions at sub-national level. The Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee consist of officers of the departments of Revenue, Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions at the appropriate level. They are appointed by the respective Panchayati Raj Institutions, of whom two must be the Scheduled Tribe members and at least one must be a woman (Section 6(8)). A less frequent but more targeted approach to addressing women’s barriers in the forestry sector consists in establishing a legal requirement that experts in women’s issues be part of the membership of these bodies or be consulted prior to decisions being taken.

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**Papua New Guinea** – The *Forestry Act 1991* sets up National Forest Boards whose membership must include one member with awareness of the concerns of women affected by forestry operations, and appointed by the National Executive Council from a list of two persons submitted by the National Council of Women (Article 10(1)(h)).

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### 3.6. Temporary special measures in fisheries legislation

Women's contribution and involvement in the fisheries sector has been well documented. Whether they work as fishers and fish farmers in subsistence and commercial fishing from small boats and canoes in coastal or inland waters, or entrepreneurs in aquaculture, women face similar challenges in securing their tenure rights. Furthermore, the persistence of traditional gender roles which place the bulk of domestic responsibilities on women still largely prevents them from engaging in commercial offshore and long-distance capture fisheries (FAO, 2011).

Temporary special measures in the fisheries sector take many forms, from the introduction of quotas in fisheries management bodies to the development of trainings and financial support to female entrepreneurs, as shown in the examples below.

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#### Temporary special measures in fisheries legislation:

##### National approaches

**Republic of Korea** – the *Support of Female Farmers and Fishermen Act* aims to contribute to the health of families in rural communities, the development of agriculture and fisheries, and the development of rural communities by actively supporting the protection of rights and interests of female farmers and female fishers and the advancement of their status. It establishes a consultative council fostering policies for female fishers for the purpose of advising the Minister of Agriculture, Food and Rural Affairs (Article 7). In addition, the state and each local government have the responsibility to provide *inter alia* technical education on agriculture and fisheries, education on management of agriculture and fisheries and the establishment of the education system thereof to foster female farmers specialized in agriculture and fisheries and to support female farmers who intend to engage in fishing independently (Article 9).

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**Philippines (the)** – The *Agriculture and Fisheries Modernization Act of 1997 (No. 8435)* recognizes the special needs of women in the agriculture and fisheries sectors and requires the Department of Agriculture to plan and implement special training projects for female workers (Section 107).

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Costa Rica's *Draft Law for the sustainability of the small-scale artisanal fishing sector, in the context of food security, poverty eradication and shared governance* contains a number of gender-responsive legal provisions that go beyond temporary special measures and provide a holistic approach to gender equality in the fisheries sector. Under this Law artisanal fishers are defined as "men and women engaged in small-scale fishing activities" (Article 2(r)). This definition highlights women's contribution to the fisheries sector, which is often associated with the post-harvest sector, such as the processing, sale, distribution and marketing of resources. This definition recognizes that women may also be engaged in the harvesting of those resources.

In addition, the Draft Law contains a prohibition of gender-based discrimination in access to the natural resources and technologies necessary to the practice of small-scale fishing (Article 4(i))

and in customary systems applicable to fisheries (Article 4(k)). Importantly, the Law provides both a legal basis for the achievement of gender equality through the use of special measures (Article 4(f)), and substantive special measures *per se*. Indeed, the Draft Law includes a reference to the *Law on Association*, amended in 2010 to establish a minimum percentage of women on the board of these associations. The Draft Law establishes that the overrepresentation of one sex cannot exceed one member (Article 10). From the date of entry into force of the Draft Law, the Costa Rica Institute for Fisheries and Aquaculture (Incopesca) will reject applications for the creation of fishing organizations, associations and cooperatives that do not comply with the requirements of the *Law on Association* and its provisions on the representation of women within these organizations (Article 53).

Furthermore, women must make up 50 percent of the members of each local committee created under the Draft Law to promote the responsible governance of marine and freshwater fisheries (Article 31). Incopesca is also required to facilitate and promote the participation and decision-making of women in small-scale fisheries and to facilitate the elimination of discrimination which occurs as a result of customary practices (Article 52). Another measure which isn't a special measure but contributes to women's tenure security in the fisheries sector, is the incorporation of safeguards for women's property rights in marriage and cohabitation. The Draft Law recognizes two types of small-scale fishing licences, individual and collective licences. It makes an explicit effort to protect the rights of the spouse and the cohabitating partner by establishing that individual small-scale fishing licences generate rights for the spouse or partner.

The Draft Law refers to a provision on the dissolution of marriage in the *Family Code Law No. 5476* which entitles the spouse or partner to half of the property acquired during marriage, and by extension, to cohabitation. Article 242 of the Code extends the property rights and obligations created through marriage to partners living in a *de facto* union (cohabitation) for more than 3 years. This provision in the Draft Law helps identify and protect the right of the spouse and partner which may have otherwise been overlooked, had the provision been simply non-discriminatory. Finally, to facilitate the mainstreaming of gender equality, the Draft Law outlines the responsibilities of the National Institute of Women in the implementation of the Law's provisions.

### 3.7. State compliance with Articles 3 and 4

The CEDAW Convention establishes a regular reporting process which requires states to report every 4 years on the status of its implementation into national policy, including that of temporary special measures. Countries must provide information on the nature and content of the temporary special measures that are already in place or in the process of being adopted, and on the benefits and results of these measures on gender equality. Following the review of national reports, the CEDAW Committee submits recommendations for governments to consider and implement. This accountability mechanism allows national stakeholders to keep track of the progress made and to voice any concerns.

Civil society has an important role to play in this reporting mechanism and can provide greater accountability through the preparation and submission of shadow reports. These shadow reports provide an important avenue for civil society to monitor the implementation of the Convention and to advocate for better compliance by providing a more complete or balanced

picture of the situation. In 2005, a shadow report prepared by the organization Women for Women's Human Rights (WWHR), proposed a more nuanced view of Turkey's reports to CEDAW. In particular, it pointed out that a proposed amendment to Article 10 of Turkey's Constitution had called for the insertion of a clause mandating the state to take all necessary measures to provide gender equality, including special temporary measures. The report highlighted that this amendment was rejected in parliament and reformulated into a general statement that women and men have equal rights and that the state is responsible for overseeing that this equality is put into practice. The report concluded that "this amendment does not provide the necessary constitutional basis for the adoption of special measures to promote gender equality and falls short of meeting the obligations foreseen in CEDAW Article 4 paragraph 1" (WWHR, 2005).

The reporting mechanism also helps development partners better target their support. The Asian Development Bank (ADB) includes temporary special measures as part of the projects that it finances, to facilitate compliance with CEDAW. The bank considers it a "good development practice" that is also in line with its commitments under its Policy on Gender and Development and its long-term development framework. As such, it supports governments in meeting their obligations under national laws and policies, and international commitments including CEDAW, through the use of temporary special measures where this is feasible, realistic, and appropriate. The bank explains that putting such measures in place increases the likelihood that the project will meet ADB's Effective Gender Mainstreaming standards (ADB, 2012).

For temporary special measures to be effective, it is important to build the right policy and legal foundations. Discussions around affirmative action to strengthen women's rights to natural resources are bound to give rise to strong objections and will require inclusive debates to ensure the legitimacy of these measures. Participatory and consultative drafting of land-related policies, laws, regulations and procedures, involving both women and men from different social groups is essential to build general adherence to reform. This is a long-term process that requires strong political will on the part of the government as well as engagement and support from civil society, the private sector and development partners (FAO, 2013). The discussions should consider the adoption of temporary special measures in primary law but should also think ahead and reflect on the use of secondary legislation to facilitate their implementation. The legal drafting process should be equally inclusive and take place within the adequate policy environment. Once a draft law is ready, it should be circulated to relevant stakeholders to allow for wide consultation, debate and amendment before its formal adoption. A higher body – an ombudsperson or a human rights or gender institution for instance – should be in place to monitor implementation and compliance with the special measures, and to evaluate progress towards the achievement of de facto gender equality in natural resource ownership and control. In its *General Recommendation No. 25 on temporary special measures*, the CEDAW Committee (2004) encourages States Parties to "evaluate the potential impact" of temporary special measures before their adoption. This evaluation should be done with regards to their specific goals towards gender equality and the measures should be adopted within their national context. This will ensure that the measures are tailored to a country's national circumstances and priorities and that they are the most appropriate medium for the achievement of de facto gender equality.

## 4. The role of development partners in scaling up the adoption of temporary special measures

Around the world, despite the progress achieved in recent decades, land-related policy and legal frameworks still lack gender sensitivity and often fail to address women's specific needs and challenges. To achieve de facto equality, policies, laws and organizational frameworks need to become better attuned to the issues that undermine women's equal rights to natural ownership or control. While gender-sensitive legal frameworks in themselves cannot bring about de facto gender equality, they provide an enabling framework, conducive to the design and implementation of gender-sensitive programmes, with an increased potential to yield positive outcomes for gender equality in land, fisheries and forest tenure.

Development partners<sup>4</sup> have a catalytic part to play in promoting the adoption and subsequent implementation of temporary special measures. By establishing partnership with regional organizations and other donors they can deliver long lasting impacts for gender equality. Development partners can facilitate dialogue and awareness-raising, and work to strengthen gender equality through project design, implementation and capacity building. They can set their own gender targets and foster dialogue with governments on gender equality in natural resources management. Importantly, they can provide technical and financial support for gender-inclusive projects that deliver gender-equitable outcomes. Most development partners already set their own gender objectives and targets. The inclusion of temporary special measures in their projects is a good practice that can help them meet these objectives while at the same time supporting governments in meeting their own obligations under international law and domestic legislation, where such commitments already exist.

In 2008, the ADB adopted their *Long-Term Strategic Framework 2008-2020* that identifies gender equity as one of the 5 drivers of change (ADB, 2008). The Framework promotes the use of temporary special measures which the ADB deems necessary to accelerate progress for women, including by giving women greater access to resources, goods, money, and employment opportunities. Furthermore, in 2012, the ADB published a guidance note advocating for the use of temporary special measures to promote gender equality. The ADB makes the argument that since no state party to CEDAW has entered any reservation to Article 4 on temporary special measures, this is an important entry point for development partners to promote the adoption of special measures (ADB, 2012).

In the Americas, the Inter-American Development Bank (IADB) adopted an *Operational Policy on Gender Equality in Development* in 2010, which supports affirmative action specifically targeted to women or men with the goal of closing existing gender gaps. Meeting specific gender-based needs of either group, or ensuring the participation of either group in consultations will not constitute discrimination or exclusion (Section 4.18). The policy supports actions aimed at addressing the specific needs of both women and men, recognizing that, because of gender differences, women and men enjoy different advantages and face different barriers to participating in and benefiting from development. It also envisages to invest in

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<sup>4</sup> Understood in this context as providers of technical and financial assistance to development.

the empowerment of women as a key factor in accelerating progress toward gender equality, recognising that inequality affects women to a larger extent (Section 4.4). Importantly, the policy acknowledges that gender inequalities interact with other inequalities that are based on socioeconomic, ethnic, and racial factors, exacerbating the barriers and vulnerabilities, which justifies focusing on specific groups of women, in this case poor, Indigenous, and Afro-descendant women (Section 4.5).

More recently, in 2021 the African Development Bank (AfDB) published a revised *Gender Strategy and Action Plan (2021-2025)*, which includes a number of activities specifically targeting women's access to finance and markets through the allocation of loans to women-led small and medium enterprises and the delivery of targeted programmes to female entrepreneurs (AfDB, 2021). Although the strategy recognizes the importance of tenure rights for female entrepreneurship, it does not contain any specific measures aimed at strengthening women's access to land.

Donor-funded programmes for tenure-related policy and legal reform should support the drafting of provisions on temporary special measures and the drafting of secondary legislation to facilitate their implementation. While advocacy is commonly directed at policymakers and decision-making bodies, it is important to raise-awareness among a large interest group who can take up these issues and exercise public pressure for change and/or compliance.

## 5. Scaling up data collection on ownership or secure rights over land, forest and fisheries resources

This legal paper has set out to highlight the role of temporary special measures in accelerating the achievement of de facto gender equality in natural resources legislation. The focus was therefore placed on the legal dimensions of temporary special measures. However, the collection of statistical data on land and forest ownership or secure rights over agricultural land, disaggregated by sex, is of crucial importance to monitor the effect of temporary special measures and the achievement, or progress, towards women's de facto equality in natural resources ownership and control. As mentioned previously, Target 5.a of the *2030 Agenda* tackles the issue in relation to land ownership and control and establishes a clear link between Indicator 5.a.1. and Indicator 5.a.2.

The CEDAW Committee (2004) in *General Recommendation No. 25*, recommended that States Parties provide statistical data disaggregated by sex in order to measure the achievement of progress towards women's de facto equality and the effectiveness of temporary special measures (Section 35). The collection of data under Indicator 5.a.2 should be done in conjunction with the collection of information under Indicator 5.a.1, for several reasons. First, disaggregated data on land ownership or secure rights over agricultural land will help clarify the situation of women's legal security in relation to agricultural land. Second, data on the share of women among owners or rights-holders of agricultural land will provide a clearer picture of the disparities that exist between men and women. Finally, the disaggregation by type of tenure can help prioritize the tenure arrangements where the widest gaps have been found. This data should form the basis for the adoption, discontinuation, or revision of temporary special measures.

At country level, the link between the use of temporary special measures and the collection of data on natural resource ownership and control needs to be better acknowledged and better integrated into policy-making processes. The type of special measure to adopt should be determined using the evidence provided by statistical data, on where the disparities are and in what tenure type. In practice, the country's national statistics office should collaborate with the body tasked with overseeing the monitoring of special measures to determine whether or not to discontinue the use of special measures, to extend their use, or to adjust them to better target the causes of disparities on the ground.



## 6. Conclusion

In compliance with their obligations under CEDAW, most countries have now enshrined the principles of gender equality and non-discrimination in their constitution. However, another obligation under CEDAW, the one that requires states to demonstrate progress towards the achievement of de facto gender equality has yet to materialize in many aspects of women's rights. Achieving de facto gender equality in tenure rights requires more than just ensuring that no law, policy or programme discriminates on the basis of sex. For women to experience equality in land, forest and fisheries tenure, governments must take active steps to understand the sources of inequality. They must ensure that as right holders or stakeholders, women are included in decision-making processes over natural resources, and crucially, they must undertake the necessary legal reforms to increase women's secure rights to land, forests and fisheries.

This legal paper set out to identify national approaches to the use of temporary special measures, in the context of land, fisheries and forest tenure. It identified the use of temporary special measures in the constitution, which can take the form of a generic enabler of preferential treatment in national legislation, or of specific provisions granting special treatment generally through the use of quotas. Some countries have chosen stand-alone laws on equality (or gender equality) to serve a similar function. Here too, temporary special measures can be generic or specific. While specific temporary special measures can be applied immediately, generic provisions rely on sectoral legislation to give effect to preferential treatment through the adoption of specific temporary special measures. This research also identified the use of ad hoc temporary special measures in stand-alone legislation, where a legal instrument is entirely dedicated to providing the conditions for preferential treatment to take effect. Examples include legislation setting up women's funds which may contain measures to strengthen women's ownership of land. Finally, this legal paper identified the use of temporary special measures in land, forest and fisheries-related legislation. The desk review showed that temporary special measures in those sectors tend to focus on the adoption of quotas for the representation of women in resource management bodies, but can also extend to the delivery of financial and technical support to women within certain categories, and to preferential treatment in access to certain resources.

Development partners have an important role to play in supporting affirmative action measures, both in their operational modalities by targeting vulnerable groups of women, and in encouraging partner governments to enact temporary special measures to address gender inequalities in tenure rights and achieve gender equality in practice. The *2030 Agenda* provides an important avenue for the adoption of temporary special measures in land-related legislation. The collection of information under SDG Indicator 5.a.2. should be done in connection with the collection of statistical data on land ownership disaggregated by sex, to help set better gender targets in land-related policies and laws and measure progress in land ownership and control. While the adoption of temporary special measures in forests and fisheries is not directly foreseen by the SDGs, these sectors are nonetheless closely connected to land tenure systems, and women involved in forest and fisheries activities are equality-reliant on secure tenure rights for their livelihoods and well-being. As such, the adoption of temporary special measures in these sectors deserves more attention and should be encouraged on a systematic basis, wherever inequalities continue to prevent women from enjoying and exercising their rights on an equal basis with men.

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Most countries now have explicit legal protections against discrimination on the basis of gender. However, in practice, gender equalities persist in tenure rights over land, fisheries and forests. This legal paper puts a spotlight on Articles 3 and 4 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which require states to adopt temporary special measures, whenever necessary, to achieve substantive equality between men and women.

This legal paper shows the many applications of temporary special measures in national systems, from their incorporation into the constitution, laws on equality, stand-alone legislation on special measure, through to their more specific use in sectoral legislation. This non-exhaustive typology of temporary special measures will hopefully provide a fresh outlook on the legal options available to lawyers, policy makers and parliamentarians to achieve substantive gender equality in tenure rights.

Development partners will also find useful guidance on the role of temporary special measures in supporting the implementation of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)*, the monitoring and reporting of SDG legal indicator 5.a.2, and the collection of statistical data on SDG indicator 5.a.1.

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