Development and implementation of the FAO Voluntary Guidelines for Responsible Governance of Tenure of Land as it is seen by a Member State

- Perspectives for Hungary and Central- and Eastern-European countries

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Key words: Voluntary Guidelines, land tenure, 'land grabbing', new Hungarian land act

SUMMARY

The aim of this paper is to give an overview about the reasons behind the growing international pressure on agricultural land and its effects. It describes the phenomenon of the so called 'land grabbing' and brings examples to it. The paper introduces the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security,* recently adopted by the Committee on World Food Security, as a first global step towards responsible land governance. The paper gives an insight into the three year development process of the Voluntary Guidelines including personal experiences concerning the inter-governmental negotiations. Focusing on transition countries in Central and Eastern Europe, it explains the relevance and possible future use of the Voluntary Guidelines. As a country case study the evolving new Hungarian Land Law and its driving principles are described in the light of the Voluntary Guidelines. Finally, conclusions are drawn and issues are raised concerning the future implementation of the Voluntary Guidelines and other ongoing international processes related to responsible agricultural investments.

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1. INTRODUCTION

Land has always been a strategic resource in the history of mankind. Numerous wars have been fought either to gain new territories or to protect the already possessed areas. Land is the basis for human life: it is the shelter, the resource of food, livelihood, place of culture, religion, the source of natural resources, and in the end of life the mourning place. With the fast growing number of people living on this planet the race for the limited resources is getting more and more intense.

In the last decade global demand for land has been rapidly increasing. Large amount of farmland has been acquired through purchase or long term lease mainly in developing countries by domestic or foreign investors. The scale of such land deals may reach several thousands of hectares, or even exceed one million hectare. Since the parties involved in large-scale land acquisitions usually prefer to keep these agreements in secret, there is no exact data available on the quantity of land transferred worldwide. According to conservative estimates of the World Bank 56 million hectares worth of large-scale farmland deals were announced by the end of 2009 (Deininger 2011). Others say, that about 227 million hectares of land has been sold or leased in developing countries mostly to international investors since 2001. The majority of these land acquisitions have taken place recently according to the continuous research of the Land Matrix Partnership¹ (Oxfam, 2011, p.2). Most of the deals are carried out in Africa, but there is an increasing investment activity also in Asia, Latin-America and in transition countries in the Eastern Europe and Central-Asia Region.

The new wave of interest in agricultural land is a result of a number of inter-related causes such as:

- *national food security concerns*: the price hikes and the bans on food export in the course of the 2008-2009 food crisis caused insecurity on the commodities markets. Countries with adequate financial resources but limited availability of arable land and water (e.g. the Gulf States, China) started to purchase or lease land abroad to secure their national food supply directly.
- high returns in agricultural investments: rising agricultural commodity prices attract investments. Agribusiness players usually involved in food processing and distribution enter also into direct production (Cotula, 2009). Buying agricultural land has become an attractive option also to banks, investment funds, pension funds etc. which are looking for lower-risk investments due to the recent financial and economic crisis.

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¹ The Land Matrix database is available at: http://landportal.info/landmatrix

Speculation, however, further increases the volatility of food prices which hits worst the most vulnerable people.

- *increasing demand for bio-fuels:* government consumption targets and financial incentives (e.g. in the EU and the USA) play a key role in the rapid increase in bio fuel production which boosts further the demand for large plots of land.
- attractive investment climate in developing countries: besides improving legal environment for investments and some infrastructural development, host governments often make generous offers to investors in order to attract foreign capital in to the agricultural sector.

The commercial pressure on land is expected to continue, since the total amount of globally available agricultural land cannot be further increased. On the contrary, it will decrease due to demographic growth, urbanisation, land degradation and climate change. Feeding the growing world population, which is predicted to reach 9 billion by 2050, will be a permanent global challenge.

According to estimates of the Food and Agriculture Organisation of the United Nations (FAO) currently there are 1 billion hungry people in the world. To reduce the number of hungry, more agricultural investments are needed in developing countries. Local farmers' and national governments' resources are essential but usually not enough to meet these challenges despite the financial assistance by donors and international organisations. Therefore the private sector's involvement, foreign investments are also necessary inter alia to increase production, modernize agriculture, introduce new technologies and to build capacities to reduce post harvest losses. However, if such investments are not properly regulated and monitored by the host country governments, there is a considerable risk that the rights and interest of local communities will be violated.

In developing countries globally more than 1 billion people have no registered right to the land they are cultivating. In case of large scale land deals often infringements of human rights were reported in the media. Affected land users were not consulted, land was sold without their consent, and local families (occasionally over 100 000 people) were evicted by force from their homes. Recently, much public debate has focused on such issues which are also called 'land-grabs'. The term refers to the purchase or long term lease of large plots of land mainly in developing countries by wealthier food-insecure nations and private investors in order to produce crops for export (Shepard, 2009). The deals are mainly driven by national food security concerns or speculation. Host country governments have a key role in preventing 'land grabs', which seem to be the result of weak governance, unregulated tenure rights, weakness of institutional background, lack of transparency in land deals, corruption and lack of consultation with local communities. Although they have limited access to external financial resources they should authorize investments only if they comply with the three (economic, environmental and social) pillars of sustainability. Investments should be economically viable, environmentally friendly and contribute to rural employment and achieving food security. Private investors have a huge responsibility and should not only concentrate on the economic pillar of sustainability but they have to respect the environmental and social aspects as well.

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In order to assist states improving the governance of land tenure but also to give guidance to all stakeholders involved in such land related issues there was an urgent need for a global agreement on definitions, principles and internationally accepted standards for responsible practices. The first, and so far the only existing global reference for such best practices are the Voluntary Guidelines on the Responsible Governance of Tenure of Land.

2. THE DEVELOPMENT OF THE VOLUNTARY GUIDELINES

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security was adopted by the Committee on World Food Security² (CFS) on 11th May 2012. The Voluntary Guidelines are a collection of internationally accepted principles and practices that governments can refer to when making laws and administering land, fisheries and forests rights. The Voluntary Guidelines were developed through an inclusive consultation process, which was initiated by the Food and Agriculture Organisation of the United Nations (FAO) in 2009. The text was finalised through CFS-led intergovernmental negotiations with the participation of government officials, civil society organizations, private sector representatives, international organizations and academics. José Graziano da Silva, Director General of FAO said that "Giving poor and vulnerable people secure and equitable rights to access land and other natural resources is a key condition in the fight against hunger and poverty. It is a historic breakthrough that countries have agreed on these first-ever global land tenure guidelines." (FAO M. C., 2012.)

The aim of the Voluntary Guidelines is to support countries to improve their governance of land tenure in order to ensure better food security of their population with special attention given to smallholder farmers, indigenous communities and women's rights. Although the Voluntary Guidelines have certain limitations, they can offer support to all levels of government from national to local as well as to land rights activists, land users and all institutions involved in the development of policies and laws managing access to natural resources. The Guidelines set standards for acceptable practices that can be used to evaluate proposed and existing policies and programmes." (Kropiwnicka, 2012, p.1) They should also be applied as international soft law instruments which can become a point of reference for future national and international legislation.

Placing land tenure, a highly contentious issue, on the top of the international political agenda is already an important achievement; 98 countries and the EU (as an FAO member organisation) were involved in the three rounds of inter-governmental negotiations. The

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² The CFS is the global forum in the UN system for reviewing and following up on policies concerning world food security. The membership of the Committee is open to all Member States of The Food and Agricultural Organization (FAO), The International Fund for Agricultural Development (IFAD) or The World Food Programme (WFP) and non-Member States of FAO that are Member States of the United Nations. Participants can be from representatives of UN agencies and bodies, civil society and non-governmental organizations and their networks, international agricultural research systems, international and regional financial institutions and representatives of private sector associations and private philanthropic foundations. (further information at: http://www.fao.org/cfs/en/).

multi-stakeholder dialogue established under the umbrella of the CFS was in itself an excellent opportunity, to share positions, experiences and best practices across countries, regions and continents. The presence of Civil Society Organisations' representatives was a great advantage: they added real-life examples to the negotiations, and reminded on the constraints and struggles of the most vulnerable.

Reaching consensus in a multilateral setting is evidently a challenging, sometimes almost impossible task. Due to conflicting national, political, economic and financial interests of the negotiating parties also in case of the Voluntary Guidelines the final text is an outcome of a series of compromises. It was generally acknowledged that EU member states (together with Switzerland) were well coordinated, constructive parties in the negotiations, and played an important role in building consensus, finding acceptable wording for contested issues and working on building bridges between disputing countries. The working relationships and methods established in the course of the consultation process will also facilitate future international cooperation.

3. IMPROVING GOVERNANCE OF LAND TENURE WITH THE ASSISTANCE OF VOLUNTARY GUIDELINES

These guidelines are universal and applicable in all countries. Some may need to improve their legislation and institutional capacity in order to protect their farmers and mitigate risks and long term effects of large scale land deals. Other countries should take responsibility for companies based within their borders, and use the document as a tool to guide them how to realize foreign agricultural investments in a responsible way considering the real development needs and respecting the rights and interest of the local people. NGOs and local community organisations should also be informed and trained, as they can be the voice of the affected families. "While the guidelines acknowledge that responsible investments by the public and private sectors are essential for improving food security, they also recommend that safeguards should be put in place to protect tenure rights of local people from risks that could arise from large-scale land acquisitions, and also to protect human rights, livelihoods, food security and the environment." (FAO M. C., 2012)

The Voluntary Guidelines address the following issues:

- setting guiding principles for responsible land tenure governance and the implementation of the guidelines. The principles for implementation are: human dignity, non discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability and continuous improvement. The Guidelines also describes tenure related rights and responsibilities, required policy, legal and organisational frameworks. (Part 2)
- legal recognition and protection of tenure rights even under informal systems (Part 3)

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³ The Voluntary Guidelines say: "Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host states to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights." (Part 2, 3. 3A para 3.2)

- transfers and other changes to tenure rights: investments in land, land consolidation, restitution, redistributive reforms. Managing expropriations and restitution of land to people who suffered from forced evictions in the past (Part 4)
- assuring accessible and affordable administrative systems, guidance to solve disputes over tenure rights including trans-boundary matters (Part 5)
- responses to climate change, and emergencies such as natural disasters and violent conflicts (Part 6)
- implementation and monitoring of the Voluntary Guidelines (Part 7)

4. RELEVANCE OF THE VOLUNTARY GUIDELINES FOR TRANSITION COUNTRIES IN CENTRAL AND EASTERN EUROPE

Agriculture in some countries of Eastern Europe and of the former Soviet Union is still characterized by large farms and by an increasing number of agro-holdings. "Those countries experienced significant economic policy reforms and restructuring processes in the past 20 years. The extreme extension of arable land in the Soviet Union, was followed by the abandonment of more than 25 million ha of land after the collapse of socialism in 1990." (IAMO, 2012) Estimates reach from 20 to 40 million hectares of unused agricultural land located in the post-Soviet region. The price of fertile, black earth soil is still relatively low: "it is 10-15 times lower than in Argentina and 60 times lower than in Sweden. Low prices are partly due to combination of political instability, lack of clarity about property rights or restrictions to sales and the large supply of unused land." (Visser, 2010, p. 687)

In times of transition, general governance becomes weak. "During institutional change the distribution of property right remains unclear and unregulated for a certain period of time." As a protection Eastern European countries posed moratoriums on foreigners prohibiting them to purchase land in order to "gain time to resolve restitution claims and enable local citizens to acquire land first". The temporary ban on agricultural land (for example in Hungary and Slovakia) has been an excellent measure to prevent land grabbing during the transitional period. Once this period is over, the risk for small farmers that their land is grabbed will be low since regulations on expropriation became generally fair in Eastern European countries. Smallholders may however be effected by market mechanisms that may lead to crowding out. (Wehrmann, 2010, p.19) However, a ban on purchase sometimes is not enough. In Ukraine, the "breadbasket" of Europe, despite the moratorium, 17 million hectares are controlled by Ukrainian and foreign agro-holdings. (Lambert, 2010)

In comparison to Africa and Asia, land accumulation or land grabs in transition countries in the European and Central-Asian Region have been receiving little attention so far. Foreign investment in these countries is mainly dominated by Western European firms and the Gulf States whereas within Siberia Asian countries are the main investors. Most of such large-scale land deals were targeted to Ukraine, Russia, Lithuania and Romania. For instance:

the Oakland Institute reports that the Swedish investment groups Black Earth Farming and Alpcot-Agro along with the British investment group Landkom collectively acquired nearly 600,000 hectares in Russia and Ukraine (Shepard, 2009);

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- Ukraine leased in barter for oil over 100 000 hectares of farm land to Lybia (Visser, 2010);
- short term investments in Ukraine by investment banks, like JP Morgan (US) which controls 40 000 hectares of farmland (Visser, 2010);
- in 2008 the UK's Palmer Capital (which also has a main office in Germany) and UK's Bidwells launched a joint fund, the 'Farmland Fund', with a value of € 300 million. The fund would invest 70-90% in farmland, with up to 15% allocations in timber and supporting infrastructure. Land investments would target inter alia the Czech Republic, Hungary, Poland, and Romania. (FIAN, 2010)

In the light of these events and conditions it seems that countries in transition would still need guidance and support to strengthen land governance. The Voluntary Guidelines and the informal aid of FAO to its application could be used in the process of reforming the legal and institutional framework of land management, especially of state owned land. FAO could give these countries technical support to adapt the guidelines to their national contexts and implementation.

Transition countries and countries that completed recently the transition process (e.g. by EU accession) have a double 'identity' concerning large-scale land investments: while small-farmers may suffer from the negative impacts of such investments within the borders, wealthy private investors of the same country might realize land investments overseas with similar impacts. Governments, therefore have a double task to protect and – in parallel – control their citizens. The Voluntary Guidelines can assist them to perform both tasks with success.

5. THE PRINCIPLES OF THE VOLUNTARY GUIDELINES AND THE EVOLVING NEW LAND ACT IN HUNGARY – CASE STUDY

Hungary is undergoing a second wave of land reform since the collapse of the communist block. According to EU regulation, Hungary has to open also its land markets for all EU member states. In order to prepare for the liberalization the semi-finished land reform has to be continued. Hungary's transition process was officially concluded by its EU accession. The reality is, that concerning land management there is still a lot to be done to consolidate land governance and land tenure systems in the country. The Hungarian Government has initiated a national consultation about the proposal of the new Land Act ('Act proposal on management of agricultural land and forests'). Since this is a process in progress final conclusion can not yet be drawn from the proposal. However, it is a promising fact, that the basic principles of the new land legislation concept – such as protection of local farmers especially with small and medium sized family farms, increasing transparency of land deals and strengthening institutional capacity – are coherent with the Voluntary Guidelines.

To examine the results of Hungary in the recent transform of its land governance and the experiences in elaborating its new Land Act can be useful for other countries in the region going through transition.

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5.1. Restrictions to foreign land ownership in Hungary

Before the regime change in 1989-90 the majority of agricultural land was owned by the state and by large-scale cooperative farms. During the time of transition land was privatized, legal frameworks were set up for private management of land in the emerging market economy. In order to protect national farmers the Land Act (1994. LV. Act) excluded foreign individuals and legal entities from buying land in Hungary. Inland legal entities were also not allowed to possess land, in order to protect land from foreign shareholders and from capital rich companies attempting to monopolize agricultural land.

When Hungary joined the EU in 2004 it was supposed to respect Article 56 of the Treaty establishing the European Community which permits the free flow of capital and the freedom to move. According to the principle of national treatment, citizens of any EU Member State should have equal conditions to buy farmland as citizens of Hungary. Temporarily, the EU allowed Hungary to imply moratorium on land purchases by foreigners. The moratorium expires in 30 April 2014, and it can not be further extended. The current national legislation allows to foreigners to buy land only with certain limitation: they can acquire no more than 300 hectares, they are required to have permanent residence in Hungary and to be engaged in agricultural activities in their own name and at their own risk. The land market in Hungary is still underdeveloped; land prices are relatively low, and many Hungarian farmers lack investment capital to increase the size of their land. This creates a risk that when the land market will be opened to the foreign capital, the situation could get out of control and significant proportion of the fertile, agricultural land would become foreign investors' possession.

The EU determines that nations have the right to create their own farmland protection legislation. Several EU member states use legal and administrative tools to control foreign purchase of their land and are indirectly favouring their own farmers. Following those examples and in order to mitigate the mentioned risks, the Hungarian Ministry of Rural Development elaborated a new Land Act concept which is under public debate at the moment. The new Hungarian Constitution adopted in 2010 states that land is a national treasure, and the basis of the nation's existence. In this spirit there is an effort to create laws which guarantee that Hungarian land will remain in Hungarian hands (MORD 3., 2012).

On the other hand, despite of the current moratorium foreign investors own already a significant proportion of land. Estimates say that there are about 1-1.5 million hectares of Hungarian arable land acquired by foreigners under the so called "bogus contracts". Recently the Hungarian Government announced that it has the intention to stop this phenomenon and clear the land market of those illegal hidden agreements. No surprise that there is a lot of resistance from the parties involved, creating some tension even in international relations.

5.2. Concept of the new Land Act

According to the explanations attached to the Land Act proposal of the Ministry of Rural Development (MORD 1., 2012, p. 50-52) one of the main objectives of the new Land Act is

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to determine, who may purchase land in Hungary, and who may not. It supports those farmers' land demands that are ready and able to cultivate land. The explanation says that, those should be under negative discrimination that are able to neglect the regulation and in cases where regulations cannot be proofed. Therefore the proposal suggests that legal entities should not be entitled to own land instead they could acquire land use rights. The New Land Act would give – in line with our duties relating from international agreements – national treatment for the Member States of the EU and the European Economic Area. At the same time it would give priority in land purchase or lease to farmers who live in place. On third country nationals and legal entities the present restrictions on land ownership will remain. Further differentiation between farmers would be based on the size and production capacity of their farms and on objective, transparent and public conditions based on guidelines on national land tenure policy. The priority policy is rural development. The act proposal wishes to regulate land transactions to reach public goals such as strengthen the capacities of villages to keep in place rural population, create rural jobs and incomes, keep the incomes in place where it was created (see the Voluntary Guidelines /in the following referred to as VG/ Para 12.1).

The New Land Act will support the agricultural primary producers to gain land and will aim to strengthen family farms in order to enable them to increase their size of farms, with thus increasing the proportion of middle sized farms. In theory these would form the base of the Hungarian agriculture securing rural jobs by giving work to family members. Farm sizes are largely imbalanced in Hungary. The country has ca. 7,36 million hectares of agricultural land divided into nearly 4 million individually registered parcels with an average size of less than 2 hectares. This means a large number of small farms, many of them with difficulties to survive, small amount of large scale farms and few but growing number of middle size farms. Still, although farms over 100 ha compose only 0,8% of the legal entities they use the 67,4% of the available agricultural land. This is far above the EU average of 3% farming on 40% (MORD 1., 2012). The explanation says that the Government wishes to decrease only the proportion of large farms, at the same time it emphasizes their importance in producing agricultural products in large quantity and stable quality for market purposes.

The Land Act proposal says that land exchange would be controlled through direct and indirect tools. Directly through limiting the size of agricultural land possession, on the other hand indirectly through supporting those farmers who meet specific conditions related to priority land tenure policies (for example by right of first offer).

Another goal of the Land Act is to prevent speculative land purchasing and settle the issue of unclaimed land (see VG Para 11.2 and 7.3). Land acquisitions or leasing driven by speculative investments are planned to be eliminated with the requirement to make public all agreements of land right transfers (see VG Para 3B 8). Furthermore, all contracts would be subject to authorisation which may be carried out by the National Land Fund and by local land committees. Access to land will be condition of statutory land use and defaults will be sanctioned. (see VG Para 8.7, 8.9)

The New Land Act – in line with the already existing legislation – does not include the management of state owned lands. Those are under the governance of the Hungarian National

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Land Fund, which would get increased function in the future. It would play an active role at the land market by buying or leasing land as well as mediating land to farmers. It would regularly assess and publish land prices and leasing prices, and would play an active role in settlement of the use of commonly owned land. The National Land Fund would also have general right of pre-emption and financial means in order to influence the market. (MORD 2., 2012.) (see VG Para 8.10)

The proposal states that the Land Act should be applied with respect to the principles in the Constitution on the responsible use of natural resources, in particular land. The New Hungarian Constitution states that: "All natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation's common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations." (Fundamental Law of Hungary, 2011, Article P)⁴. The following years will show how the new Land Act and related legislation will serve the overall goal of preserving natural resources, especially land resources in Hungary.

6. CONCLUSION - PRINCIPLES AND PRACTICE

It is indeed a great achievement to have at hand internationally accepted guidelines for responsible tenure of land. However, the real value of the Voluntary Guidelines depends on its actual implementation by national governments, institutions, private companies and NGOs.

There are promising initiatives concerning the future of the Voluntary Guidelines. Some countries – such as Germany, Belgium, France and the EU itself – have already offered financial support to FAO to assist host countries to implement these guidelines in practice. In addition, a group international NGO-s who participated in the negotiation process are preparing a specific guide for Europe on the application of these recommendations.

The formal adoption of the Voluntary Guidelines opened the way to start – precisely to continue – another international process related to land tenure and large-scale agricultural investments. The first draft of the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (RAI) was developed by The World Bank, UNCTAD⁵, FAO and IFAD⁶ in 2009, and was strongly debated. In theory, these voluntary Principles would encourage and promote responsible and sustainable investments, but many fear that they would also legitimize the 'land grabs' of the past years by offering the status quo.

Three years after the Aquila Summit the G8 launched a *New Alliance for Food Security and Nutrition* in May 2012 to reinforce its commitment to support Africa in improving food security. The G8 countries in partnership with African leaders and by mobilizing private

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⁴ In addition Article XX of the new Constitution states that "Hungary shall promote the exercise of the right set out in Paragraph (1) by ensuring that its agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking water... and by ensuring environmental protection."

⁵ UNCTAD – United Nations Conference on Trade and Development

⁶ IFAD – International Fund for Agricultural Development Agnes Dús

investors agreed to increase agricultural production in Africa⁷. The parties "confirm their intention to take account" of the Voluntary Guidelines as well as the PRAI. In addition, "they intend to work together specifically to develop pilot implementation programs for the Voluntary Guidelines and the PRAI" (G8, 2012). Private investors listed in the agreement are mainly large transnational agro-holdings offering their financial and technical support to African countries. However in return, governments are required to adjust their legislation, to open markets for "improved seeds". There is no doubt that such an alliance will be profitable for the private sector, but those countries which have struggled for long with aid dependency might end up in seed and other input dependency.

In the light of the recent developments it is clear that, the success of the Voluntary Guidelines can be measured on their implementation, whether the parties involved in investment projects are committed to apply these guidelines in good faith. The meeting rooms where international negotiations take place are very far from the field. The question is whether we can bring principles and practice closer to each other. FAO is playing a leading role in giving assistance to countries to turn principles into practice. Now it is up to the Member States to start with the implementation of the Voluntary Guidelines.

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⁷ Such agreements have been signed so far with Tanzania, Ghana and Ethiopia.

⁸ In the G-8 document the RAI principles are referred to as PRAI.

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BIOGRAPHICAL NOTES

Agnes DÚS is currently working as FAO coordinator at the Ministry of Rural Development in Hungary. During the Hungarian EU Presidency, in the first semester of 2011, she was assistant of the Permanent Representative of Hungary to FAO in Rome. She closely followed the consultation process on the Voluntary Guidelines and participated in all rounds of intergovernmental negotiations.

Having a professional interest for land tenure issues she held presentations related to the Voluntary Guidelines in the Ministry of Rural Development and continues to follow the news on global land tenure issues. (Presentations: Meeting of the Hungarian National FAO Committee, January 2012; Conference in the honor of the Graduate Students of the FAO-Hungarian Joint Scholarship Programme, June 2012.)

Previously she worked as an International Relations Expert at the Ministry of Rural Development (2009-2010). She holds a university degree in Economics with a specialization to International Relations, Foreign Affairs and Environmental Management from the Corvinus University of Budapest (2009).

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