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Defining Fiscal Transparency: Transnational Norms, Domestic Laws and the Politics of Budget Accountability

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Defining Fiscal Transparency: Transnational Norms, Domestic Laws and the Politics of Budget Accountability

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ACCOUNTABILITY**

Abstract: Since the early 1990s, the issue of fiscal or budget transparency has attracted increasing attention at transnational and domestic policy levels, among agencies such as the IMF and OECD, and through NGOs initiatives such as the International Budget Project. At the domestic level, where budgeting takes place, some jurisdictions have enacted legislation to formalize their commitments to fiscal disclosure. This paper tracks the emergence of global norms about fiscal transparency through the interaction of ‘soft law’ measures with more conventional legal forms, drawing on examples from both higher and lower income countries. It offers a critical analysis of the various purposes and interests that transparency may serve, and of the role of international norms and legal institutions in shaping domestic political processes of budgeting. We find that prevailing models of budget transparency focus primarily on reinforcing fiscal discipline, and on the provision of information to establish credibility for financial markets, international lenders and aid donors. These imperatives have overshadowed attempts to shed light on other dimensions of fiscal policy, such as its distributive impact and its democratic legitimacy. As a result, we conclude, the current understanding of “best practices” in this field will be of limited use in generating the political consensus needed to ensure equitable development at the national or the global level.

Keywords: taxation; fiscal policy; budgets; transparency; development; soft law; international tax; governance; distributive justice; transnational norms; economic policy; democracy

JEL classification: K33, K34

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DEFINING FISCAL TRANSPARENCY: TRANSNATIONAL NORMS, DOMESTIC LAWS AND THE POLITICS OF BUDGET ACCOUNTABILITY

Lisa Philipps* & Miranda Stewart**

I. INTRODUCTION

Since the early 1990s the issue of fiscal transparency has attracted increasing attention at transnational and domestic policy levels, among international institutions, governments and non-government actors concerned with fiscal policy. The OECD and IMF have embarked on significant programs to develop standards and codes of conduct on budget transparency and to assess country practices in this area.¹ Non-governmental organizations (NGOs) have developed their own indices to measure and compare fiscal transparency internationally.² At the domestic

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¹ See Organisation for Economic Co-operation and Development, "OECD Best Practices for Budget Transparency" (2001) 1(3) *OECD Journal on Budgeting* 8; International Monetary Fund, *IMF Code of Good Practices on Fiscal Transparency* (2007) <<http://www.imf.org/external/np/pp/2007/eng/051507c.pdf>> at 19 September 2008 and Fiscal Affairs Department, *Manual on Fiscal Transparency* (2007) International Monetary Fund <<http://www.imf.org/external/np/pp/2007/eng/101907m.pdf>> at 19 September 2008 (revised from the Fiscal Affairs Department, *Manual on Fiscal Transparency* (2001) International Monetary Fund <<http://www.imf.org/external/np/fad/trans/manual/manual.pdf>> at 3 October 2008).

² In the late 1990s the Institute for Democracy in South Africa (IDASA) collaborated with the International Budget Project (IBP), based in Washington, D.C., to develop a survey questionnaire for evaluating budget transparency which was then applied to South Africa: see Alta Fölscher, Warren Krafchik and Isaac Shapiro, "Transparency and Participation in the Budget Process: South Africa: A Country Report" (Institute for Democracy in South Africa: Budget Information Service and the International Budget Project, 2000). This methodology has been adopted for studies of several other countries. Details of Latin American study. The Centre on Budget and Policy Priorities, a non-

level, where budgeting takes place, some jurisdictions have enacted legislation to formalize their commitments to fiscal disclosure. Academic scholars have begun to take note of these trends and to publish studies on the extent to which governments are conforming to global norms, and how this is (or is not) affecting fiscal policy outcomes.³

The OECD has described the budget as “[t]he single most important policy document of governments, where policy objectives are reconciled and implemented in concrete terms.⁴ As indicated by this statement and as has frequently been said about taxation, the (re)distribution of benefits and burdens through the budget is an inherently political process requiring negotiation of a fiscal compact or bargain establishing legitimacy and fairness for sustainability in the longer term.⁵

A central argument of the paper is that fiscal transparency is not a politically neutral public good but one that is open to different definitions that serve different interests. Fiscal transparency norms as they are currently promulgated and implemented reveal both a distributional and a democratic deficit. They are focused primarily on fiscal discipline and on the provision of information to establish credibility for financial markets, international lenders and aid donors and fail to take seriously the *political* centrality of budgeting. This paper seeks to address these deficits through a focus on two gaps in the existing research on budget transparency norms.

government organisation (NGO) based in Washington, D.C., launched its Open Budget Index in 2006 with the goal of scrutinizing fiscal transparency practices in different countries around the world: International Budget Project, *Open Budget Initiative* (2006) Center on Budget and Policy Priorities <<http://www.openbudgetindex.org/>> at 7 July 2008. For information on the history and goals of the Open Budget Index see the website of the IBP: International Budget Partnership, *Transparency and Participation in the Budget Process* (2006) Center on Budget and Policy Priorities <<http://www.internationalbudget.org/themes/BudTrans/index.htm>> at 7 July 2008.

³ Francisco Bastida and Bernardino Benito, “Central Government Budget Practices and Transparency: an International Comparison” (2007) 85(3) *Public Administration* 667.

⁴ OECD Best Practices for Budget Transparency, above n 1, 7.

⁵ Nicholas Kaldor, “Will Underdeveloped Countries Learn to Tax” (1962-63) 41 *Foreign Affairs* 410, 418; Margaret Levi, *Of Rule and Revenue* (1988); Sven Steinmo, *Taxation and Democracy: Swedish, British, and American Approaches to Financing the Modern State* (1993); Mick Moore and Lise Rakner, “The New Politics of Taxation and Accountability in Developing Countries” (2002) 33(3) *Institute of Development Studies Bulletin* 1.

The first is a lack of critical analysis concerning the purposes and meanings of transparency in the context of budgeting. The second is a lack of attention to the role of law or legal institutions in securing different visions of fiscal transparency. We hope to contribute on these fronts by assessing how the concept of fiscal transparency is being defined in transnational legal discourse.

In order to draw out the range of meanings that can be attached to fiscal transparency we particularly consider the extent to which the various codes and statutes promote transparency regarding the distributive and social justice impacts of budgetary decisions and the democratic oversight of government budgets by legislative and civil society actors. We find that these dimensions of transparency have been widely neglected in the design of prevailing norms which are more concerned with exposing any fiscal imprudence, mismanagement or dishonesty to outside scrutiny. While those aspects of transparency are obviously critical, they have overshadowed any efforts to shed light on the distributive impact of tax and spending policies, or to give relatively marginalized groups of citizens a more effective voice in budget processes. As a result, we argue, the “best practices” that currently dominate this field will be of limited help in generating the political consensus needed to ensure equitable development. These deficits should concern all of us but may be especially problematic for those developing countries for which issues of poverty reduction and economic sovereignty are most pressing. The paper also examines some alternative definitions of fiscal transparency that do more to address these issues.

An inquiry into the nature, goals and uses of fiscal transparency leads to a number of questions that we note here and will return to below. First, what is the role of *law* in the spread and reform of budget transparency norms and in establishing “transparency” as an identifiable measure of good governance (however that be defined)? This is a part of the broader question of the role of law in development.⁶ Does law “matter”

⁶ The relationship between law and development has begun to be critically analysed by many scholars after nearly two decades of “law reform” which has frequently been less rather than more successful: see, eg, Kevin Davis and Michael Trebilcock, “The relationship between law and development: optimists versus skeptics” (2008) *forthcoming in American Journal of Comparative Law* ; David Kennedy, “Laws and Developments” in John Hatchard and Amanda Perry-Kessaris (eds), *Law and*

for development at all and more specifically, what is the importance of the “rule of law” and “good governance” in the fiscal context? If it is important, what role might budget transparency laws play in a particular country’s “development” process and who might they serve in this process? Further, to what extent does it matter if budget norms are legal (hard law) compared to “soft law” norms, administrative practices or market incentives?

Second, we emphasise in this paper the importance of fiscal transparency in empowering engagement of citizens to participate in establishing a fair and legitimate fiscal policy in a country, both through their representatives in a democratic legislature and more broadly. This draws on broader theories of engaged, deliberative democracy in which laws play the important role of establishing the rules of engagement in the decision-making process.⁷ As we see the budget as central to political decision-making about taxing and spending, we advocate the expansion of budget transparency laws to fulfil this role and identify the shortcomings of current fiscal codes and norms that fail to address this audience for transparency and accountability.

In Part 2 we analyze the reasons why fiscal transparency has surfaced so widely and insistently as a law reform issue at this particular juncture. Part 3 tracks the paths and networks by which these norms have been developed and transmitted globally, through initiatives at various international and domestic levels. Part 4 provides more details about the content of fiscal transparency, according to the dominant model associated principally with the IMF. Part 5 takes a closer look at how various fiscal transparency codes and statutes deal with (or do not deal with) issues of distributive impact and politics. Part 6 examines democratic participation in the budget process. In Part 7 we discuss the implications of this case study for the broader project of “ruling the world” including the role of law or norms and the implications for national and global governance. We emphasize the need to design transnational fiscal norms that foster inclusive institutions of democracy at the country level, recognizing that nation states remain the primary actors in formulating fiscal policy, even

Development: Facing Complexity in the 21st Century: Essays in Honour of Peter Slim (2003) 17.

⁷ Philip N Pettit, “Depoliticizing Democracy” (2004) 17 *Ratio Juris* 52.

as we also identify the beginnings of an architecture that could provide an inclusionary framework for taxing and spending in the global context.

II. THE ROOTS OF FISCAL TRANSPARENCY DISCOURSE: HISTORICAL SOURCES AND CONTEXT

Fiscal policy – taxing, spending, borrowing, lending – is at the core of governmental exercise of political power. Budgeting is a process for organizing government fiscal activities and prudence in fiscal management – in some commonsense way, matching expenditures to revenues – is the essence of budgeting. Yet while the analogy with household budgeting is often made, the key difference is that a government’s overall budget constraint is not set by any objective standard: what a government can raise in resources to spend is limited only by its capacity and desire to do so and its distributive and allocative goals. The budget constraint is a moveable feast, itself a set of political choices, capabilities and distributions.

The basic principle of fiscal transparency, that governmental fiscal activities should be subject to public scrutiny, is not new. A central purpose of budgeting has always been to ensure a degree of transparency, and therefore accountability, regarding the nature and quantum of public spending and taxation.⁸ The institutional and procedural framework for raising, appropriating, spending and accounting for public funds is typically laid out in a country’s constitution and financial management legislation, and supplemented by longstanding convention. Even in developing countries such “organic finance laws” have generally been in place for several decades based on administrative practices entrenched in colonial times, though in practice these formal rules may not be fully implemented.⁹

Despite these traditional commitments to public budgeting, the term “fiscal transparency” has recently obtained renewed currency as the banner for a host of policy initiatives designed to regularize budgeting

⁸ See Aaron Wildavsky, “A Budget for All Seasons? Why the Traditional Budget Lasts” (1978) 38(6) *Public Administration Review* 501, 502.

⁹ Mike Stevens, “Institutional and Incentive Issues in Public Financial Management Reform in Poor Countries” (Working Paper No 35106, World Bank, 2004), 5.

practices and mandate disclosure of specific information by governments around the world. In this Part we explore the question of why this discourse of fiscal transparency has emerged so forcefully since the mid-1990s. We suggest it has two principal sources.

The first source was the general turn to neoliberal models of economic policy, in which governments lost authority as economic decision makers and were made subject in various ways to more intensive forms of market discipline, in particular to control or reduce budget deficits.¹⁰ This included the discipline of credit-rating agencies that directly impacted the cost to governments of financing a budget deficit, and of market analysts who influenced where mobile capital would be invested. In developing countries such market pressures were reinforced by explicit conditions imposed on concessional lending and other forms of aid. In order to establish credibility with these increasingly powerful external audiences and allow them to assess investment risks, governments had to be more forthcoming with detailed information about country finances.

The constraint of government action in economic matters first became apparent in relation to monetary policy. Developed country governments have evolved various methods by which monetary policy is institutionalised in such a way as, at least to some extent, to take it out of the hands of elected governments.¹¹ Most developed countries have established frameworks that delegate the setting of interest rates to an independent central bank. Monetary policy also may involve controls on exchange rates in particular in many developing countries (for example, countries may peg their currency to the US dollar, or establish currency boards or limits on currency exchange). However, the key goal of

¹⁰ See, eg, Peter A Hall, "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain" (1993) 25(3) *Comparative Politics* 275, 285, identifying this "shift" in the "locus of authority over macroeconomic issues" away from the Treasury and Keynesian economics towards monetarism, cemented under Margaret Thatcher and institutionalised through the 1980s and 1990s, although the UK Treasury set interest rates until enactment of the Bank of England Act in 1998 under Chancellor Gordon Brown, which provided operational independence to the Bank. See also Carl Emmerson, Chris Frayne and Sarah Love, "Updating the UK's Code for Fiscal Stability" (Working Paper No W04/29 Institute for Fiscal Studies, 2004), 17.

¹¹ Emmerson, Frayne and Love, above n 10.

monetary policy in developed countries is the control of inflation, and the key mechanism in an era of floating currencies and open economies is the adjustment of the interest rate. As inflation is influenced in part by beliefs and prior expectations, a government could use a monetary target “to influence these expectations” and “as long as the target can be committed to credibly, expectations of inflation attaining its target level in themselves create conditions favourable to that level of inflation being realised.”¹² What is most interesting about this transformation here is the rise of a need for governments to establish “credibility” with markets - and their loss of authority as economic decision-makers.

New Zealand was a pioneer in legalizing central bank control over interest rates, during its period of massive economic liberalisation in the 1980s. It established a monetary policy framework a full five years before it addressed fiscal policy, in the Reserve Bank of New Zealand Act (NZ) 1989.¹³ This Act was proudly explained in 1996 as having “no exact parallels anywhere else in the world” in establishing a process for setting inflation targets which would be implemented by the Bank “without interference from Government, Treasury, or anybody else”.¹⁴ The Bank would report to Parliament and “since uncertainty involves costs, the objective of monetary policy, and the modus operandi of policy implementation, should be as open and transparent as possible”. It was claimed that the same philosophy applies to fiscal policy:

... the key is transparency - indeed, chronologically it was the transparency in the Reserve Bank Act which inspired the idea of attempting something similar for fiscal policy. Government’s hands are tied only by the need to make policy intentions absolutely unambiguous to

¹² Ibid. See also IMF *Manual* on monetary policy and central bank independence, at 26.

¹³ Specifically, the goal of this Act was to “Muldoon-proof” monetary policy, a reference to the previous long-standing Prime Minister of New Zealand: Donald T Brash, “New Zealand’s Remarkable Reforms” (Speech delivered at the Fifth Annual Hayek Memorial Lecture, Institute of Economic Affairs, London, 4 June 1996). The Institute of Economic Affairs bills itself as right wing and “the UK’s original free-market think-tank”, begun in 1955 (see Institute of Economic Affairs, <<http://www.iea.org.uk/>> at 10 October 2008). Brash’s speech also discussed the NZ fiscal responsibility reforms in depth.

¹⁴ Brash, above n 13.

the public - surely a fundamentally sound principle.¹⁵

The IMF monitors monetary transparency and practices as well as fiscal transparency and it released its *Code of Good Practices on Monetary and Financial Policies* on 26 September 1999.

Governments have not formally delegated their powers to set fiscal policy as they have with respect to monetary policy. However, in the last decade, a range of legal and administrative constraints have been placed by governments on their own fiscal decision-making. The question of why governments – in particular elected governments - should agree to constrain themselves in this way is an interesting one and the answer is not obvious, depending as it does on a much broader view as to the relationship between the legislature and executive, the state and the market and the size of the state.¹⁶ The evidence suggests that for fiscal policy, as for monetary policy, the desire to strengthen credibility vis-à-vis external audiences has been the driving factor.¹⁷ In particular, credibility regarding deficit constraint has been an ongoing theme in the push to establish fiscal frameworks. Trends to increase legislative control over budgeting, including imposition of fiscal rules and other measures, have been identified as a reaction to concerns about “precarious” fiscal balances and about “losing the confidence of world credit markets”.¹⁸

Initially, many countries legislated harder fiscal caps that expressly require a balanced budget or place limits on permissible spending or

¹⁵ Ibid.

¹⁶ This question is asked by Emmerson, Frayne and Love, above n 10 and see also Allen Schick, “The Role of Fiscal Rules in Budgeting” (2003) 3(3) *OECD Journal on Budgeting* 7, 8: “Why have democracies accepted or imposed fiscal limits on themselves, and why should we expect these limits to be effective when they run counter to the preferences of voters and politicians?”

¹⁷ There have been a few suggestions to make fiscal policy “more like” monetary policy – a lever to be pulled in response to economic conditions – and thereby take some of the “politics” out of setting tax rates. See Nicholas Gruen, “Greater Independence for Fiscal Institutions” (2001) 1(1) *OECD Journal on Budgeting* 89. So far, this path has not been taken up by either the international institutions or country governments.

¹⁸ Paul Posner and Chung-Keun Park, “Role of the Legislature in the Budget Process: Recent Trends and Innovations” (2007) 7(3) *OECD Journal on Budgeting* 77, 6-7; Schick, above n 16.

borrowing, sometimes with schedules for deficit elimination. Examples include the expenditure ceilings introduced in many developed countries such as Finland, Japan, Spain, Sweden and Switzerland (and in the European Union generally through the Stability and Growth Pact, discussed in part 3.E below).¹⁹ However, experience with set targets or ceilings during the 1990s was not always positive. Academic researchers concluded that numerical deficit or surplus targets or balanced-budget laws are ineffective and tend to be too inflexible and to increase incentives for “creative accounting” by the executive.²⁰ Experience demonstrated that these more coercive restraints were often ignored, or worse they encouraged gaming as governments tried to hide non-compliance through accounting changes or off-budget spending.²¹ The IMF has criticized the “perverse incentives” that such rules may generate to engage in “one-off measures or creative accounting”, unless they are backed by transparent reporting “such that non-compliance can be easily detected and

¹⁹ Isabelle Joumard et al, “Enhancing the Cost Effectiveness of Public Spending: Experience in OECD Countries” [2003](2) *OECD Economic Studies* 109, 120 and Tables 2 and 3. Schick claims that prior to World War II, “virtually all democratic countries embraced a balanced budget rule, including some that often breached the rule or did not have any legal constraint on unbalanced budgets”, above n 16, 15.

²⁰ Alberto Alesina and Roberto Perotti, “Fiscal Discipline and the Budget Process” (1996) 86(2) *American Economic Review* 401 and references to unpublished papers cited therein. At least some of this research took place inside the IMF, whose preoccupation with budget deficits is indicated by Alberto Alesina and Roberto Perotti, “The Political Economy of Budget Deficits” (Working Paper No 4637, National Bureau of Economic Research, 1994); See also James L Chan, “Major Federal Budget Laws of the United States” in Siamack Shojai (ed), *Budget Deficits and Debt: A Global Perspective* (1999) 17.

²¹ See Miguel Braun and Nicolas Gadano, “What are fiscal rules for? A critical analysis of the Argentine experience”, CEPAL Review 91 (April 2007); Allan Drazen, “Fiscal Rules from a Political Economy Perspective” (Paper presented at the IMF-World Bank Conference on Rules-Based Fiscal Policy in Emerging Market Economies, Oaxaca, 14-16 February 2002), 13-17; “Annual Report of the Executive Board for the Financial Year Ended April 30, 1998” (International Monetary Fund, 1998), 40; George Kopits and Jon Craig, “Transparency in Government Operations” (Occasional Paper No 158, International Monetary Fund, 1998), 2; IMF *Manual* (2007), above n 1, 40-42; Organisation for Economic Co-operation and Development, “Fiscal Sustainability: The Contribution of Fiscal Rules” [2002](2) *OECD Economic Outlook* 117; Lisa Philipps, “The Rise of Balanced Budget Laws in Canada: Legislating Fiscal (Ir)responsibility” (1996) 34 *Osgoode Hall Law Journal* 681; and Charles Wyplosz, “Fiscal Policy: Institutions versus Rules” (2005) 191 *National Institute Economic Review* 70, 74-76.

addressed”.²² As a result, the IMF *Code* does not advocate the adoption of substantive fiscal caps. Instead the Manual discusses such fiscal rules as possible one element of an overall policy of fiscal transparency, stating that this discussion “should not be taken as an endorsement of the practices themselves”.²³

The need to establish fiscal credibility in the eyes of financial markets, donors and investors has been a key factor driving budget transparency initiatives and other governance reforms in both developing and developed countries. As one IMF staff member explained to an audience consisting largely of representatives from developing countries:

In fiscal policy perhaps nothing matters quite so much these days as what the financial markets think you are doing and how well you are doing it, and to add to the financial markets I think you increasingly have to take into account the fact that the donors like to know what it is that a country is doing and how well it is doing it.²⁴

Likewise, transparency initiatives in developed countries have been associated with efforts to tighten fiscal discipline and signal “credibility” to the markets. The OECD has recommended strategies for member countries to control spending in the face of pressures due to population aging and infrastructure gaps and has emphasized the role that transparency can play in reinforcing a commitment to fiscal restraint, for example by exposing the cost of maintaining programs over the longer term, or the cost of tax expenditures.²⁵ As Schick notes:

“From New Zealand to the United States, developed countries embarked on a massive effort

²² IMF *Manual* (2007), above n 1, 41. Similarly the OECD suggests that more coercive fiscal rules such as balanced budget laws or spending caps may be ineffective unless accompanied by transparency rules that prevent governments from hiding certain expenditures off budget: Joumard et al, above n 19, *.

²³ IMF *Manual* (2007), above n 1, para 22 p. 14-15 and discussion at p. 15.

²⁴ Barry Potter, “The IMF Transparency Code” (Paper presented at the Second Conference of the International Budget Project, Cape Town, 23 February 1999).

²⁵ Joumard et al, above n 19, 5 and 12-23.

of “government reengineering” to restore discipline in the budget process and to better target dwindling budgetary resources towards higher priority uses.”²⁶

While prudent fiscal management – matching expenditures to revenues – has a commonsense appeal, what is less obvious on the face of the transparency debate are the constraints on taxation which, when combined with the spending constraints, have the ideological goal of restricting the overall size of government. In developed countries, reduction of taxes on capital and mobile labour has been a constant trend and refrain since the beginning of the 1980s. In developing countries, the trend is more complex: it is accepted that taxes should be increased so as to enable proper provision by government but a combination of economic globalisation (especially the mobility of capital) and domestic distributional politics puts great pressure on the ability of states to do so. We have written about the focus on fiscal deficits and the politics of tax reform in other forums and do not spend further time on it here;²⁷ however, it remains an essential part of the neoliberal turn to which fiscal transparency norms can, in part, be traced.

The second major impetus for the new discourse of fiscal transparency came from changing ideas about governance that affected developing and developed countries in different ways. In the later 1990s development theorists and agencies began to emphasize the need to support institutional reforms or “good governance” in developing countries, and to strengthen initiatives to reduce poverty and address the social side of development. These ideas took hold in the wake of widespread dissatisfaction with the neoliberal model and particularly the

²⁶ Allen Schick, “A Contemporary Approach to Public Expenditure Management” (Working Paper No 35116, World Bank, 1998), “Foreword”.

²⁷ See Lisa Philipps, “Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization” (2000) 63(4) *Law and Contemporary Problems* 111; and Lisa Philipps, “Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy” (1996) 11(1) *Canadian Journal of Law and Society* 141; Miranda Stewart, “Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries” (2003) 44 *Harvard International Law Journal* 139, *; Miranda Stewart and Sunita Jogarajan, “The International Monetary Fund and Tax Reform” [2004](2) *British Tax Review* 146, *.

economic and political failure of structural adjustment programs in many developing countries. The United Nations Millennium Declaration of 2000 reflected these shifting attitudes and laid out specific targets for reducing the number of people living in extreme poverty and other measurable improvements in human welfare.²⁸ The UN Financing for Development process examined how resources can be made available to achieve these goals. In 2001, a High-Level Panel chaired by Ernesto Zedillo reported a series of Recommendations.²⁹ The Panel emphasised the need for public investments in education, health, nutrition and other basic social programs and stated:

Financing an adequate level of social public expenditure while limiting budget deficits calls for substantial tax revenues. Most countries of the developing world must undertake significant tax reforms if they are to raise the additional revenue that they need.³⁰

The *Zedillo Report* stated further that developing countries themselves bear the primary responsibility for achieving growth and equitable development, in part by “creating the conditions that make it possible to secure the needed financial resources for investment.” These

²⁸ *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th sess, Agenda Item 60(b), UN Doc A/Res/55/2 (2000). Notably the *Declaration* states that creating “an environment...conducive to development and to the elimination of poverty” depends on “good governance” within each country and at the international level, as well as “transparency in the financial, monetary and trading systems” (Sections III.12 and 13). See Kerry Rittich, “The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social” in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development : A Critical Appraisal* (2006) 203 for analysis of the social turn in development discourse.

²⁹ Ernesto Zedillo et al, “Recommendations of the High-Level Panel on Financing for Development” (United Nations, 2001) (*Zedillo Report*). The *Zedillo Report* was followed by a major UN Conference on Financing for Development: see *Report of the International Conference on Financing for Development*, UN Doc A/CONF.198/11 (2002). The Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus is to be held in Doha, Qatar, from 29 November to 2 December 2008: *Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus* (2007) United Nations <<http://www.un.org/esa/ffd/doha/>> at 25 September 2008.

³⁰ Zedillo et al, above n 29, 3.

conditions include “[f]irst and foremost...good governance that commands the consent of the governed, and effective and impartial rule of law - including relentless combat of corruption...”. Budget transparency initiatives can be seen as part of this good governance agenda aimed at securing resources for development. As we discuss in part 6 below, a second element of “governance” reform has been an increase in consultation on policy reform and its implementation, in both developing and developed countries, a trend which can be seen as both a logical consequence of increased transparency or information-sharing and which has also developed as part of broader efforts to improve expenditure and tax policy outcomes. In sum, fiscal transparency laws are part of the shift to governance in the global context of fiscal reform for development.

III. THE SPREAD OF FISCAL TRANSPARENCY NORMS GLOBALLY

This Part tracks the emergence and spread of budget transparency norms since the mid-1990s through the interaction of transnational “soft law” with more conventional legal forms at the country level. While international economic agencies have played a major role in this process we find that they in turn have been influenced by government practices in certain developed countries, notably New Zealand. The normative underpinning of these codes is often obscured by the neutral, procedural language of fiscal transparency. We also draw attention to the efforts of certain NGOs to reformulate budget transparency norms to advance an alternative fiscal politics in which values of social equality and democratic legitimacy are more heavily weighted.

A. INTERNATIONAL LEVEL INITIATIVES

1. THE IMF

In previous work Miranda Stewart has documented the rising influence of international financial institutions and their affiliated experts over domestic tax reform agendas, especially but not only in developing

countries.³¹ A similar pattern of transfer from the international to the domestic level is clearly evident in the spread of fiscal transparency norms, and the IMF has taken the lead role in this process.

The IMF's work on fiscal transparency evolved directly out of its efforts to promote budget discipline as a cornerstone of worldwide economic policy. For borrower countries, reduction or elimination of deficit financing has been a key element of IMF conditionality. A review of IMF-supported fiscal reforms during the 1990s indicates that reduction of government expenditures, downsizing of the state, shifting of expenditures from current to capital account and some provision of safety net or pro-developing expenditures were key elements of IMF-funded reforms.³² By 1996 however the IMF had begun to stress that reforms to promote good governance, the rule of law, and public sector accountability were also needed in many countries to create the conditions for success of its economic policy prescriptions.³³

At this early stage of the governance revolution the IMF advocated fiscal transparency primarily as a means of shoring up fiscal discipline and improving a country's credibility with private investors. A critical 1996 Declaration restated the IMF's longstanding view that countries should aim for "...budget balance and strengthened fiscal discipline in a multi-year framework" and added:

Continued fiscal imbalances and excessive public

³¹ Stewart, above n 27; Stewart and Jogarajan, above n 27; Miranda Stewart, "Tax Policy Transfer to Developing Countries: Politics, Institutions and Experts" in Holger Nehring and Florian Schui (eds), *Global Debates About Taxation* (2007) 182. See also Art Cockfield, Allison Christians on the OECD.

³² George T Abed et al, "Fiscal Reforms in Low-Income Countries: Experience Under IMF-Supported Programs" (Occasional Paper No 160, International Monetary Fund, 1998), 4 and Part IV. And see Schick, "The Role of Fiscal Rules in Budgeting", above n 16, 8.

³³ See Interim Committee of the Board of Governors of the International Monetary Fund, "Partnership for Sustainable Global Growth: Interim Committee Declaration" (Press Release No 96/49, International Monetary Fund, 29 September 1996); and *The Role of the IMF in Governance Issues: Guidance Note (1997) International Monetary Fund* <<http://www.imf.org/external/pubs/ft/exrp/govern/govern.pdf>> at 24 September 2008, especially at 3-4 where issues of budget process and management are identified as central to the IMF's mandate and expertise.

indebtedness, and the upward pressures they put on global real interest rates, are threats to financial stability and durable growth. It is essential to enhance the transparency of fiscal policy by persevering with efforts to reduce off-budget transactions and quasi-fiscal deficits.³⁴

The link between transparency and fiscal restraint was further emphasized in an influential study paper by two senior members of the IMF Fiscal Affairs Department:

Timely publication of a clearly presented budget document makes it easier for the market to evaluate the government's intentions and allows the market itself to impose a constructive discipline on the government. Transparency increases the political risk of unsustainable policies, whereas the lack thereof means that fiscal profligacy can go undetected longer than it otherwise would.³⁵

Initially the IMF sought to encourage fiscal transparency simply by incorporating governance concerns into its existing programs of country surveillance, technical advice, and loan conditionality.³⁶ In carrying out these long-standing functions IMF staff were now to impress upon country authorities the "potential risk that poor governance could adversely affect market confidence and, in turn, reduce private capital in-flows and investment."³⁷ In 1997 the IMF moved to formalize its guidance on fiscal transparency in a detailed set of standards. This decision flowed directly from the Asian financial crisis and the sense of urgency it created about restoring market confidence.³⁸ At a meeting in October 1997 Executive Directors debated the merits of having staff prepare a "brief manual of

³⁴ Ibid.

³⁵ Kopits and Craig, above n 21, 2.

³⁶ *The Role of the IMF in Governance Issues*, above n 33, 6-9.

³⁷ Ibid 7.

³⁸ See Murray Petrie, "The IMF Fiscal Transparency Code: A Potentially Powerful New Anti-Corruption Tool" (Paper presented at the 9th International Anti-Corruption Conference, Durban, 10-15 October 1999), 2-3.

good practices for fiscal transparency.”³⁹ While the report of this discussion indicates that some Directors had reservations, staff were instructed to proceed and the IMF’s first *Code of Good Practices on Fiscal Transparency* was approved in April 1998.⁴⁰ Revised versions of the IMF *Code* were published in 2001 and 2007, along with an extensive manual which provides detailed guidance to assist with “practical implementation”.⁴¹

On publishing its first *Code* in 1998 the IMF stated the purposes of fiscal transparency more broadly than in earlier documents:

The underlying rationale was that fiscal transparency could lead to better informed public debate about the design and results of fiscal policy, make governments more accountable for the implementation of fiscal policy, and thereby promote good governance, strengthen credibility, and mobilize popular support for sound macroeconomic policies.⁴²

The IMF’s interest in promoting public debate must be read skeptically, we argue, in light of its fundamental policy orientation toward fiscal discipline. Its early discussions of transparency show that the driving purpose was not to facilitate more informed and inclusive political bargaining over budgetary decisions, but rather to help ensure that countries would stick to an IMF-approved set of fiscal policies even in the

³⁹ “Annual Report of the Executive Board for the Financial Year Ended April 30, 1998”, above n 21, Ch. 6, at 40.

⁴⁰ *Ibid.*; and *Interim Committee of the Board of Governors of the International Monetary Fund*, (Communiqué, *International Monetary Fund*, 16 April 1998).

⁴¹ *How Does the IMF Encourage Greater Fiscal Transparency?* (2008) International Monetary Fund <<http://www.imf.org/external/np/exr/facts/fiscal.htm>> at 25 September 2008; and IMF *Manual* (2007), above n 1. See also Fiscal Affairs Department, *Guide on Resource Revenue Transparency* (2007) International Monetary Fund, <<http://www.imf.org/external/np/pp/2007/eng/101907g.pdf>> at 10 October 2008.

⁴² “Annual Report of the Executive Board for the Financial Year Ended April 30, 1998”, above n 21, Ch. VI, at 40.

face of domestic political protest.⁴³

The resolution approving the 1998 *Code* noted that it “does not imply a legal obligation on members.”⁴⁴ Nonetheless, the IMF has taken concerted steps to encourage compliance. As a result, we argue, the *Code* now exerts significant normative pressure on policy makers in many countries. The IMF’s main implementation vehicle is the so-called fiscal ROSC, referring to a special module added to the Report on Observance of Standards and Codes which is used by the IMF to evaluate country compliance with fiscal norms. For example, in its 2001 fiscal ROSC on Brazil the IMF commented favourably on the country’s improved fiscal management and noted that “the cornerstone of these achievements has been the enactment in May 2000 of a Fiscal Responsibility Law which sets out for all levels of government fiscal rules designed to ensure medium-term fiscal sustainability, and strict transparency requirements to underpin the effectiveness and credibility of such rules.”⁴⁵ Fiscal ROSCs are formally voluntary as countries must request an assessment by the IMF, and they are published only by consent.⁴⁶ While many developed countries have undergone the process, take up has been especially strong among developing countries seeking better capital market access, in part because the IMF’s published reports are used by credit rating agencies and private analysts to gauge investment risk.⁴⁷ Moreover the IMF indicates it has sometimes incorporated the recommendations of fiscal ROSCs into loan

⁴³ For example in their leading paper on fiscal transparency Kopits and Craig explained its role in quelling popular protest as follows: “Although fiscal transparency cannot guarantee consensus, there have been episodes (including recent ones) where a failure to prepare the population, through adequate and candid explanation, for the removal of a critical subsidy or a labor market regulation has led to major unrest and jeopardized the improved economic performance sought by those measures”, above n 21, 2.

⁴⁴ *Interim Committee of the Board of Governors of the International Monetary Fund*, above n 40.

⁴⁵ Fiscal Affairs Department, “Brazil: Report on Observance of Standards and Codes (ROSC)-Fiscal Transparency Module” (Country Report No 01/217, International Monetary Fund, 2001), 1.

⁴⁶ By 2003 the IMF reported that 54 fiscal ROSCs had been completed of which 48 were published on its website: Fiscal Affairs Department, “Assessing and Promoting Fiscal Transparency: A Report on Progress” (International Monetary Fund, 2003), 4. A more recent document indicates that by January 2008, 90 countries from all regions and levels of development had consented to publication of fiscal ROSCs: *How Does the IMF Encourage Greater Fiscal Transparency?*, above n 41.

⁴⁷ *Ibid.*

conditionality for particular countries.⁴⁸ One example is Argentina, where a new Fiscal Responsibility Law was enacted in 2004 as a direct response to IMF requirements for institutional reform.⁴⁹ The decision to undergo or comply with the results of a fiscal ROSC cannot be seen as equally voluntary for all countries.

Globally, it is our view that the IMF *Code* is the dominant model, and it has had pervasive influence via several channels. The norm-transmitting capacity of the IMF *Code* has been magnified by the work of other transnational players, in both the public and private sectors. This includes the World Bank which has sometimes collaborated with the IMF in completing fiscal ROSC reports or has relied on them in its own work in particular in developing aid and loan expenditure accountability mechanisms (see further below).⁵⁰ The *Code* has also been promoted by the Financial Stability Forum (FSF), a group comprised of financial regulators from several developed countries plus international financial institutions and standard-setting bodies including the IMF.⁵¹ The FSF has urged “market practitioners to take...account, when making lending and investment decisions, of jurisdictions” observance of standards.”⁵² Private sector investment analysts do appear to use the *Code* in this manner, both by relying on IMF reports of country compliance, and by applying the *Code* independently to evaluate fiscal transparency in countries for which

⁴⁸ Ibid, para 19.

⁴⁹ See Braun and Gadano (2007), above n 21, 60-62.

⁵⁰ See International Bank for Reconstruction and Development and International Monetary Fund, “Bank / Fund Collaboration on Public Expenditure Issues” (Board Report No 25763, World Bank, 2003), especially at 20. World Bank analysts have also used the IMF *Code*, above n 1, as a benchmark for evaluating budget processes in developed and developing countries: see for example Zhicheng Li Swift, “Managing the Effects of Tax Expenditures on National Budgets” (Policy Research Working Paper No WPS3927, World Bank, 2006), 26-27; Note also endorsement by G7 Finance Ministers in 1999.

⁵¹ Financial Stability Forum, <<http://www.fsforum.org>> at 10 October 2008. Among other recent activities the FSF presented the following report: Mario Draghi, “Update on the Implementation of the FSF’s Recommendations: Report by the FSF Chairman to the G8 Finance Ministers” (Financial Stability Forum, 2008).

⁵² Follow-Up Group on Incentives to Foster Implementation of Standards, “Report for the meeting of the FSF on 6/7 September 2001” (Financial Stability Forum, 2001).

no fiscal ROSC is available.⁵³ Further, there is some evidence the *Code* is influencing the way donor countries deliver foreign aid. For example the UK's Department for International Development uses the IMF *Code* along with other international standards to help it assess the risks of delivering aid directly through a government's central budget, as contrasted with aid that is tied to specific projects or administered by NGOs.⁵⁴ The prospect of securing less conditional forms of international aid thus provides another impetus for developing countries to adopt IMF-defined fiscal transparency norms into their domestic law and practice.

2. THE OECD

Following the IMF's lead, the OECD began work in 1999 on a set of *Best Practices for Budget Transparency*, (the *OECD Practices*) gleaned from the experience of member countries.⁵⁵ The active involvement of both the IMF and the OECD indicates the global sweep of fiscal transparency norms, encompassing developed and developing nations alike. As explained in Part 2, like the IMF, the OECD's interest in this subject is firmly rooted in its concerns about the prudence and sustainability of fiscal policy within its membership. Though many OECD countries reduced their large deficits during the 1990s, budget balances are thought to be at risk in future due to spending pressures associated with demographic aging, including health care and pensions.⁵⁶ The OECD has predicted that the fiscal consequences of this trend will be "severe" in virtually all its member countries.⁵⁷ From its perspective the main purpose of transparency measures is to encourage spending restraint by revealing

⁵³ Ibid para 32. See also Murray Petrie, "Promoting Fiscal Transparency: The Complementary Roles of the IMF, Financial Markets and Civil Society" (Working Paper No 03/199, International Monetary Fund, 2003), 8.

⁵⁴ See Department for International Development, *Managing Fiduciary Risk When Providing Direct Budget Support* (U.K., March 2002), at 8-10. See also Norwegian Agency for Development Coordination, *Coordination of Budget Support Programmes: Lessons from the Joint Macro-Financial Aid Programme to Mozambique* (Report 2001/1)(online at <http://www.norad.no/items/1128/38/2574038865/0101coordination%20of%20budget%20support.pdf>), at 5.

⁵⁵ OECD *Best Practices for Budget Transparency*, above n 1, 3.

⁵⁶ See for example OECD, "Fiscal Sustainability: The Contribution of Fiscal Rules", above n 21, 117.

⁵⁷ Joumard et al, above n 19, 117-118.

“the true cost of government activities.”⁵⁸

In publishing its *Practices* the OECD took care to note that they “are not meant to constitute a formal ‘standard’ for budget transparency.”⁵⁹ The OECD is not a funding body and does not have the same types of leverage over its members as the IMF, in the sense of imposing conditions on financial assistance. Nor does the OECD formally report on country compliance with its *Practices*. Nonetheless, one of the purposes of the document is clearly to encourage reform and convergence at the country level: “[t]he Best Practices are designed as a reference tool for Member and non-member countries to use in order to increase the degree of budget transparency in their respective countries.”⁶⁰ Since 2003 the OECD has also engaged in a major research endeavour to collect detailed information about budget practices in member and selected non-member countries, through a questionnaire which covers many of the aspects of transparency addressed in its *Practices*.⁶¹ The findings of this research are made public as a free electronic database which has been used by academics to compare and rank the fiscal transparency of different countries.⁶² While it is difficult to measure the extent to which domestic policy makers, investment analysts, or other players are influenced by these rankings, their existence suggests that the OECD functions as another informal regulator of budgeting norms, though it plays a less directive role than the IMF.

The OECD focus on budget transparency is one element of its overall approach to globally coordinated government policy for

⁵⁸ Ibid 127.

⁵⁹ OECD Best Practices for Budget Transparency, above n 1, 3.

⁶⁰ Ibid.

⁶¹ The most recent version is *OECD Budget Practices and Procedures Survey* (online at <http://www.oecd.org/dataoecd/30/45/39466141.pdf>). Interestingly, while the survey includes questions about any substantive fiscal rules applicable in the jurisdiction (such as spending caps or balanced budget rules), it does not ask whether a country has enacted fiscal transparency legislation: see especially question 14.

⁶² The database was most recently updated in 2007 and can be accessed at <http://webnet4.oecd.org/budgeting/Budgeting.aspx>. For rankings based on the database see for example James E Alt and David Dreyer Lassen, “Fiscal Transparency and Fiscal Policy Outcomes in OECD Countries” (Economic Policy Research Unit at the University of Copenhagen, 2003-02); Bastida and Benito, above n 3.

investment in its *Policy Framework for Investment*.⁶³ Chapter 5 of the *Policy Framework* concerns tax policy and Chapter 10 concerns public governance. Clearly the emphasis is on the impact of law and policy on investors and in neither chapter is much emphasis placed on the budget process itself. However, Item 5.7 refers to the need for tax expenditure accounts and sunset clauses to “inform and manage the budget process” and Chapter 10 refers in general terms to the need for “public consultation mechanisms and procedures” (Item 10.4); the use of “regulatory impact assessments” (Item 10.3); “a coherent and comprehensive regulatory reform framework” (Item 10.1); and the application of anti-corruption laws and the ability for “civil society organisations and the media” to scrutinise the conduct of public officials (Item 10.7).

3. NGOs

The concept of “transparency” has a venerable history among NGOs, in particular with a focus on corruption, such as the famous group Transparency International. Several non-governmental actors are making efforts at the international level to encourage and assess budget transparency in different countries. Perhaps the most prominent is the International Budget Project (IBP) of the Centre on Budget and Policy Priorities, based in Washington, D.C. In a study on who uses the IMF *Code*, Petrie reported that civil society organizations generally found it inadequate for their purposes and thus had developed their own modified standards.⁶⁴ For example in the late 1990s the IBP worked with the Institute for Democracy and Accountability in South Africa (IDASA) to formulate an alternative budget transparency questionnaire for use in South Africa and later several other African countries.⁶⁵ The authors of the final report offered as a rationale for the study that, “in the context of widespread poverty in the developing world, citizens and civil society organisations are increasingly focusing on the budget and its effects on the distribution of resources, leading them to demand more and better budget information.”⁶⁶ Contrasting this explanation with the IMF and OECD

⁶³ Organisation for Economic Co-operation and Development, *Policy Framework for Investment* (2006).

⁶⁴ Petrie, “Promoting Fiscal Transparency”, above n 53.

⁶⁵ Fölscher, Krafchik and Shapiro, above n 2. Also cite Krafchik historical review of IBP’s budget transparency work.

⁶⁶ *Ibid* 3.

emphasis on fiscal discipline and credibility demonstrates the range of different meanings and goals that can be attached to the concept of fiscal transparency. These different visions are also reflected in the specific criteria used to measure transparency at the country level, the subject of Part 3 below.

The IBP also helped to initiate a comparative study of budget transparency in five Latin American countries.⁶⁷ The study was designed and carried out by civil society groups and academics based in Latin America, and employed both a survey of expert participants in the budget process and a separate study of the legal framework for budgeting in each country. This methodology was chosen in order to assess “whether the lack of transparency is due to legal gaps or a deficient application of budget legislation.”⁶⁸

Since the release of these regional studies, the IBP has launched its *Open Budget Index* (the “IBP Index”) based on the work of associate researchers in dozens of countries who applied a transparency questionnaire to assess their governments’ performance and determine a ranking.⁶⁹ The IBP Index is the most ambitious exercise to date and has examined budgeting practices in 59 countries through lengthy questionnaires administered by independent academic or civil society researchers in each country.

It would be a mistake to treat NGO work on fiscal transparency as entirely separate and distinct from that of the international financial institutions. Certainly, the NGO focus on empowering local civil society groups to engage with the budget process means they are less preoccupied

⁶⁷ *Index of Budget Transparency in Five Latin American Countries: Argentina, Brazil, Chile, Mexico and Peru* (2001) Center on Budget and Policy Priorities <<http://www.internationalbudget.org/resources/LAbudtrans.pdf>> at 22 September 2008.

⁶⁸ *Ibid* 1. [Note for Part 3: The researchers found that while laws regulating the budget process existed in the region, they did not include mechanisms to promote citizen participation (at 2)]

⁶⁹ The International Budget Project Open Budget Initiative (Washington, D.C.: Center on Budget and Policy Priorities, 2006), online at <http://www.openbudgetindex.org/SummaryReport.pdf>. This report and many resources on budget transparency projects worldwide are available at www.internationalbudget.org. The results were unveiled on October 18, 2006.

than the IMF or OECD with issues of economic stability and growth. However, the IBP does not present itself as opposing the IMF's fiscal transparency campaign but rather supplementing it with additional research and activism. The IBP is eager to point out that a consensus in favour of transparency crosses a range of interests:

...the idea of promoting open budgets is one that can gather support from a wide range of actors, leading to a coalition not available on other issues. Business interests often favor open budgets because they provide a better understood context in which to invest. International organizations support them because they feel open budgets are essential to good governance. Civil society organizations favor open budgets reflecting their general support of more open and democratic societies. Governments find them hard to oppose.⁷⁰

Thus, the IBP has lauded the IMF *Code* and has portrayed the work of the two organizations as “complementary” because “[i]ndependent researchers and the IMF have access to different information and target different audiences.”⁷¹ IMF staff have participated in conferences of the IBP, and its *Code* has served as a starting point for IBP work. On the other side, there is some evidence that IMF personnel have begun to place some stock in the IBP's findings about transparency in particular countries and to incorporate them into its analyses.⁷² These interweavings complicate the pattern of norm development at the transnational level, as they suggest a significant degree of collaboration between different policy networks or epistemic communities.

⁷⁰ International Budget Partnership, above n 2, “Why Focus on Budget Transparency and Participation”.

⁷¹ Institute for Democracy in South Africa (IDASA), “Transparency and Participation in the Budget Process: The South African Case Report” (Paper presented at the Second Conference of the International Budget Project, Cape Town, February 1999), 3 (cited in Petrie, “The IMF Fiscal Transparency Code”, above n 38, 9).

⁷² See for example Taryn Parry, “The Role of Fiscal Transparency in Sustaining Stability and Growth in Latin America” (Working Paper No 07/220, International Monetary Fund, 2007), where she includes data from the Open Budget Index.

4. AID DONORS, THE WORLD BANK AND EXPENDITURE MANAGEMENT

Budget transparency and accountability also concerns aid donor country governments in their capacity as donors. As identified recently by the OECD, donors and the World Bank have put significant effort into strengthening and managing accountability for aid and project expenditure and much less into budgeting in general, or tax policy and administration.⁷³ Several avenues have been developed by country donors to strengthen and help manage public finances and fiscal policy in aid recipient countries.

First, the Poverty Reduction Strategy Paper (PRSP) process associated with conditional lending and debt relief comprises the central means by which the IMF and World Bank seek to consult with developing country governments, the poor and other stakeholders in respect of expenditures, reforms and policy generally. More than 70 PRSPs had been completed by countries borrowing from the IMF and World Bank as at March 2008. They are lengthy documents, running to several hundred pages. The key goals of PRSPs are stated to be to strengthen country ownership of reform programs, enhance the poverty focus of programs and provide for stronger collaboration between the institutions, recipient countries and other development lenders and donors.⁷⁴

Second, the OECD jointly with the Development Assistance Committee (DAC), which is the peak body for donor countries, has begun to monitor aid effectiveness and in 2005 established a program to monitor the use of harmonised standards to assess public financial management in aid recipient countries; to provide training and share experiences; and to establish harmonised accounting standards for aid recipient countries reporting on external assistance.⁷⁵

⁷³ OECD (2008), p. 27

⁷⁴ Independent Evaluation Office, "Evaluation of the IMF's Role in Poverty Reduction Strategy Papers and The Poverty Reduction and Growth Facility" (International Monetary Fund, 2004), 14.

⁷⁵ Development Cooperation Directorate of the DAC, Public Financial Management; this followed the "Paris Declaration on Aid Effectiveness" (High-Level Forum on Joint Progress Toward Enhanced Aid Effectiveness, 2 March 2005), an international agreement to which over one hundred Ministers, Heads of Agencies and other Senior

That monitoring process builds on the Public Expenditure and Financial Accountability (PEFA) program (www.pefa.org) established in 2001 and is jointly financed by the World Bank (using its Development Grant Facility), the European Commission, the UK (through its Department for International Development), Switzerland, Norway, France and the IMF. PEFA has the goal of strengthening both “recipient and donor ability” to assess the condition of (presumably recipient) country public expenditure, procurement and financial accountability systems, generally termed Public Financial Management (PFM) and to develop reforms and capacity-building in this area.

The PEFA framework replaces the previous Highly Indebted Poor Country framework for country public financial assessment (so as to qualify countries for debt relief under that program) and is being used by the UK and some other countries in their own donor assessments of countries. PEFA claims strong support for its Framework for assessing public financial management and suggests that the Framework is likely to be sustainable into the future because, among other things, of:

- (i) its wide support from international agencies (the members of the OECD DAC joint venture on PFM), (ii) its fast, global adoption, despite the decentralized (country based) decision-making on if and when to use the Framework, [and] (iii) the agreement to implement repeat assessments in many countries...⁷⁶

One issue that has been widely aired over the last decade about reforms implemented in donor and lender-dominated processes, has been concerns about a lack of country “ownership” of the reform. Ten years ago, this was described in relation to conditionality-linked loan facilities of

Officials adhered and committed their countries and organisations to continue to increase efforts in harmonisation, alignment and managing aid for results with a set of monitorable actions and indicators.

⁷⁶ Public Expenditure & Financial Accountability, *Frequently Asked Questions* <<http://www.pefa.org/faqmn.php>> at 3 October 2008, answer to question 1.3.

the IMF as follows:⁷⁷

The one common theme that runs through perceptions of [the Enhanced Structural Adjustment Facility] is a feeling of a loss of control over the policy content and the pace of implementation of reform ... there is broad agreement that ownership is a necessary condition of successful policy reform.

PEFA states that it aims for a significant level of “country ownership” of expenditure management policy and systems, to reduce transaction costs for aid recipient and donor countries, to increase donor harmonisation (fragmentation of aid is described as a very significant complicating factor for recipient country budget processes). While separate from the fiscal transparency and budget assessment processes, with a particular focus on expenditure and tracking of aid funds (and debt relief benefits), a key reason for development of the PEFA Framework has been increased attention to country ownership and the move to include aid funds in a government budget rather than off budget.⁷⁸

Budget support requires negotiation by donors with a government about the overall budget expenditure process and administration through governmental mechanisms, in contrast to direct aid-to-project processes which are administered and funded in communities directly by external agencies or non-government organisations. Most aid is provided directly on a project basis and hence is off-budget. This presents real challenges for countries seeking to enhance budget transparency and accountability and also receiving large aid inflows, in particular as these can be volatile and uncertain, unless there is a mechanism for centrally tracking all aid disbursements. The World Bank has begun to take the view that a country’s own budget process is “the central institutional framework for exercising choices on where resources should be channelled and for

⁷⁷ Kwesi Botchwey et al, “Report of the Group of Independent Persons Appointed to Conduct an Evaluation of Certain Aspects of the Enhanced Structural Adjustment Facility” (International Monetary Fund, 1998), Part 2, 20.

⁷⁸ Stefan Koeberle, Zoran Stavreski and Jan Walliser (eds), *Budget Support as More Effective Aid? Recent Experiences and Emerging Lessons* (2006).

holding governments accountable”.⁷⁹ The European Commission and World Bank aim to provide 30% of aid through budget support in the longer term.⁸⁰

Concerns associated with budget support as the mechanism for aid provision include fiduciary risk where financial management in a country is weak (especially, the risk that aid will be misappropriated), increased transaction costs for donors and a strain on the capacity of the ministry of finance as the main coordinator of a variety of development priorities but the “emerging consensus among donors is that budget support is an approach better suited to countries with a good track record and ... transparent budget management”.⁸¹

The PEFA Framework overlaps with the IMF Fiscal ROSC process and with budget transparency norms. PEFA explains this as follows:⁸²

... The mobilization and utilization of financial resources for the public is a most essential part of governance. Where transparency and accountability mechanisms are weak or lacking, poor people’s needs are often marginalized and development outcomes suffer. Several PFM analytical tools can help to promote transparency through publication of their findings, including in a PFM Performance Report. However, monitoring is key to accountability... The PEFA Framework can therefore provide an important part of a monitoring framework for governance.

5. THE MAASTRICHT TREATY: BINDING INTERNATIONAL FISCAL RULES

Our final example of fiscal norm creation at an international level

⁷⁹ Koeberle, Stefan and Stavreski, Zoran, “Budget Support: Concepts and Issues” in Koeberle et al (eds), *ibid* 3, 4.

⁸⁰ For a detailed discussion of recent experiences and issues see Koeberle et al (eds), *above* n 78.

⁸¹ *Ibid* 12.

⁸² PEFA, *above* n 76, answer to question 1.2.

is that of the creation of a “hard” fiscal rule among member states in the European Union who are signatories of the Maastricht Stability and Growth Pact, established in the euro currency area to stabilize and support the currency union.⁸³ The Pact requires that member states limit annual government deficits to a reference level of 3 percent of GDP; government debt is to be limited to 60 percent of GDP.

The Pact is clearly of importance in any discussion of fiscal transparency or responsibility rules because of its establishment of an apparently binding fiscal rule at an international level and the consequent very high level of international coordination of economic policy required in the European Union. Under Article 104 of the Treaty, a set of consequences ensue for member states which breach this requirement, escalating from completion of a confidential Commission report, through a Council recommendation, publicity requirements, up to constraints on borrowing from the European Investment Bank, a requirement of a deposit with the Community or fines. For our purposes, however, the most interesting element of this binding rule is the procedural norms, data release, governmental accountability and acquiescence to economic surveillance required under the Pact and laid down in a range of Resolutions, Codes of Conduct and ECOFIN Council conclusions and recommendations.⁸⁴ These norms dominate the actual implementation of the fiscal rule. The Council of the European Union uses these procedures as its framework for conditioning increasing transparency, medium-term budgeting frameworks and expenditure management processes within the member states. This is illustrated by the ECOFIN Council Ministerial conclusions in 2007 in which they agreed “that ensuring progress towards

⁸³ The Maastricht Treaty (establishing the European Community) establishes a framework in Part 3 Title 7 under which member states “shall regard their economic policies as a matter of common concern” (Article 99.1) and hence submit themselves to “multilateral surveillance” by the European Commission and through it, by each other (Article 99.3). More particularly, member states shall “avoid excessive government deficits” as determined by the reference ratio of 3 percent for the deficit to GDP: Article 104 and the Protocol on the Excessive Deficit Procedure annexed to the Treaty; accessed at http://ec.europa.eu/economy_finance/other_pages/other_pages12638_en.htm 9 October 2008. While the specific deficit procedures in Article 104 do not apply to countries that are not euro members (such as the UK), the surveillance procedures are applied to all European Union member states.

⁸⁴ http://ec.europa.eu/economy_finance/other_pages/other_pages12638_en.htm accessed 9 October 2008.

sustainable fiscal positions is a key priority, in line with the preventive arm of the Stability and Growth Pact”.⁸⁵ The Council emphasised:

All countries not yet at their medium-term objective (MTO), should speed up the pace of deficit and debt reduction and allocate higher-than-expected revenues to this objective. ...

Recalling their conclusions of October 2006, Ministers confirmed the importance of national fiscal rules and institutions, including monitoring mechanisms, in the attainment of sound budgetary positions. In particular, they acknowledged that rules-based multiannual fiscal frameworks at national level could help to ensure adherence to medium-term budgetary plans, including by controlling expenditure. In line with the Code of Conduct, information on national fiscal frameworks and relevant innovations in national rules and institutions should continue to be reported in the annual updates of the Stability and Convergence Programmes (SCPs).

As an afterthought, the Ministers “recall[ed] the importance of domestic ownership, including the appropriate involvement of national Parliaments”. The true audience, however, for these significant “transparency” obligations is the Commission and the Council of the EU; the finance ministers and economic policy-makers of the other member states; and financial markets.

B. COUNTRY LEVEL INITIATIVES

In this section we shift the focus to the domestic level by charting the adoption of budget-related legislation in selected countries, seeking to

⁸⁵ ECOFIN Council Press Release (October 2007), Conclusions on improving the effectiveness of the stability and Growth Pact, http://ec.europa.eu/economy_finance/about/activities/sgp/council-october-2007_en.pdf accessed 9 October 2008.

uncover the historical process of norm creation and transfer.

1. DEVELOPED COUNTRIES: NEW ZEALAND, AUSTRALIA, AND THE U.K.

The experience of these three countries is critical because it shows that ideas about fiscal transparency have not only migrated from the transnational to the domestic level, but also in the reverse direction. All three (Anglophone) countries rank above the average in a recent study of country compliance with OECD *Practices*, with New Zealand “far and away” the best performing country.⁸⁶ As we shall see, that may be because the OECD *Practices* follow the New Zealand design. Australia ranks highly on integrity, control and accountability but less highly on budget reports and specific disclosures according to this study, while the United Kingdom ranks high on disclosures and accountability but very low on budget reports, (a poor mark which brings its average down).⁸⁷

New Zealand pioneered the design of budget transparency legislation with its *Fiscal Responsibility Act* 1994, a move that predated all of the international fiscal transparency codes discussed above. This Act was highly innovative in that it sought to tighten fiscal discipline not through hard fiscal caps, but through procedural rules that stressed transparency.⁸⁸ It caught the attention of fiscal policy analysts in the international agencies and the New Zealand model quickly became a “benchmark” for defining fiscal transparency.⁸⁹

Australia and the UK followed by enacting comparable statutes in

⁸⁶ Bastida and Benito, above n 3, Figure 1 on p. 680 and Figure 4 on pp. 684-5. We consider the results of this study (one of the few comparative studies made to date) to be interesting but with significant limitations, including that it is based on country self-reporting through an OECD questionnaire process; and that it does not examine actual practice but the legal and administrative procedures in place.

⁸⁷ Ibid Figure 4 on pp. 684-5.

⁸⁸ See Angela Barnes and Steve Leith, “Budget Management That Counts: Recent Approaches to Budget and Fiscal Management in New Zealand”, *Treasury Working Paper 01/24* (New Zealand Treasury Department, 2001); and Jon Janssen, “New Zealand’s Fiscal Policy Framework: Experience and Evolution”, *Treasury Working Paper 01/25* (New Zealand Treasury Department, 2001). [also get Graham C. Scott, “Government Reform in New Zealand” (IMF 1996); and C. Mangiano, “Accountability and Transparency in the Public Sector – The New Zealand Experience” (IMF 1996)].

⁸⁹ See Kopits and Craig, above n 21, Chapter 3.

1998, the same year the IMF approved its first *Code*.⁹⁰ All three governments eschewed strict numerical limits in favour of procedural rules that mandated disclosure of the government's fiscal policy agenda and actual results on an ongoing basis. The experience of these nations influenced the development and enforcement of fiscal transparency standards by the IMF and OECD.

For example, Australia took an early leadership role by conducting a detailed analysis of its own compliance with the IMF *Code* shortly after its adoption in 1998. IMF staff participated as independent reviewers of the draft report. The stated purpose of the whole exercise was to “contribute to international financial reform” by “preparing a self-assessment report, providing a format and methodology that other countries may choose to follow.”⁹¹ Australia's *Charter of Budget Honesty* emphasises publication of fiscal strategies, outlook and performance reports, and a long-term intergenerational report. Australia is said to have pioneered the Medium Term Expenditure Framework (MTEF) using multi-year forward estimates as the starting point for considering governmental department bids for resources from the budget, within the overall resource framework set by the government.⁹² However, notably, this is not contained in the *Charter* but is a matter of institutional practice. The Budget is to be managed in accordance with “prudent” fiscal practice.⁹³

The UK government's *Code for Fiscal Stability* was approved by the Parliament under section 155(7) of the Finance Act 1998.⁹⁴ New Zealand's example, and the IMF work on budget transparency both appear

⁹⁰ Charter of Budget Honesty Act 1998 (Cth); *The Code for Fiscal Stability* (1998) Her Majesty's Treasury <http://www.hm-treasury.gov.uk/media/2/9/fiscal_stability.pdf> at 10 October 2008.

⁹¹ Commonwealth of Australia, *Making Transparency Transparent: An Australian Assessment* (March 1999), at 5-7 (online at <http://www.treasury.gov.au/contentitem.asp?NavId=016&ContentID=178>).

⁹² Schick, “The Role of Fiscal Rules in Budgeting”, above n 16, 18.

⁹³ *Charter*, cl. 5.

⁹⁴ The EU Stability and Growth Pact was also being developed at this time; Although the UK did not join the euro currency area (and hence is not required to adhere to the strict budgetary deficit rules established under the Maastricht Treaty), as a member of the EU it monitors its compliance with the European Pact.

to have been important influences. However, perhaps most important was the goal of “signalling a commitment to sensible management of the public finances” by the new Labour government.⁹⁵ Chancellor Gordon Brown stated that the *Code* was intended to strengthen the openness, transparency, accountability and “credibility” of fiscal policy.⁹⁶ The UK Code does not impose explicit fiscal caps but operates together with two non-binding, “conventional” budget principles that are outside the Code. These are the “golden rule” (which states that the current budget surplus must be at least zero, or rather, there should not be a deficit, over an economic cycle) and the “sustainable investment” rule that requires that net debt will be maintained below 40 percent of GDP in an economic cycle.

The role of New Zealand especially suggests that fiscal transparency norms did not simply emerge from within the IMF, but were formed by a broader epistemic community that included policy makers in certain key developed countries. However once a blueprint was codified at the international level, the IMF and OECD began using it to assess the budget institutions and practices of many other countries facing a wide range of different economic development challenges. As Rodrik observes, the use of such blueprints may be beneficial in enabling an efficient process of reform, but also carries risks if it overshadows local political processes that ensure local ownership and effective design and implementation of reforms.⁹⁷ In particular, attempts to reform the public financial management systems of developing countries by simply transplanting advanced country best practices have often failed, according to Stevens. Too often such reforms do not jibe with the informal culture and traditions around which governance has stabilized in the host country, or they require too much support from external consultants to be sustained over the long term.⁹⁸

⁹⁵ See discussion in Emmerson, Frayne and Love, above n 10, 6. The Labour Party under Blair and Gordon Brown was elected in a landslide victory in 1997.

⁹⁶ *The Code for Fiscal Stability*, above n 90; Her Majesty’s Treasury, “Chancellor Proposes Code for Fiscal Stability” (Pre-Budget Report 1997: Press Notice No HMT 2, 25 November 1997).

⁹⁷ Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (2007), 164-5

⁹⁸ Stevens, above n 9, 1-4.

2. DEVELOPING AND EMERGING COUNTRIES: NIGERIA, PAKISTAN, INDIA AND SOUTH AFRICA

Moves towards establishment or reform of budget laws and fiscal frameworks were also begun in many developing and emerging countries during the last decade. Some countries adopted these laws at least in part influenced by the policy directions of the IMF, either through conditionality-linked borrowing or as part of the general surveillance process carried out by the IMF, including through a fiscal ROSC. In other countries, in particular emerging economies and strong democracies including South Africa and India, a different path has been taken towards establishment of fiscal transparency laws, with some different outcomes in both content and impact of these laws.

IMF-linked reforms

Pakistan: In 2000 the IMF lamented in a review of Pakistan's fiscal regime that "[t]he current legal framework does not make specific provision for reporting on performance or reporting to parliament or the public beyond the annual budget and annual accounts presentations."⁹⁹ It recommended that Pakistan consider "developing a Public Finance Act...giving explicit emphasis to performance and fiscal transparency."¹⁰⁰ Three years later, following a technical advice mission to Pakistan, the IMF reported that the country had made progress on transparency through several steps including "preparation of a draft fiscal responsibility law."¹⁰¹ Pakistan's Parliament subsequently enacted the *Fiscal Responsibility and Debt Limitation Act, 2005* which includes both substantive fiscal targets and transparency provisions requiring government to make regular reports to the National Assembly.¹⁰² While domestic politics were no doubt also at

⁹⁹ Fiscal Affairs Department, "Report on Observance of Standards and Codes (ROSC): Pakistan-I. Fiscal Transparency" (International Monetary Fund, 2000), para. 13.

¹⁰⁰ Ibid para 38.

¹⁰¹ Fiscal Affairs Department, "Assessing and Promoting Fiscal Transparency", above n 46, 13. Other reports urging or praising the adoption of fiscal transparency legislation at the country level include Fiscal Affairs Department, "United States: Report on the Observance of Standards and Codes-Fiscal Transparency Module" (Country Report No 03/243, International Monetary Fund, 2003), 33-34;[add more references].

¹⁰² Act. No. VI of 2005 received the assent of the President on June 13, 2005 (Gazette of Pakistan, June 20, 2005).

play in bringing about this law reform, the IMF's involvement through its fiscal ROSC process is clearly evident. In this sense, Pakistan's legislation can be viewed as a hard law manifestation of soft law promulgated at the transnational level.

Nigeria: There is no published IMF fiscal ROSC available for Nigeria. Transparency and corruption have been and remain enormous problems in this country, in particular in relation to oil extraction. Although Nigeria has managed to pay down its international creditors and does not borrow from the IMF, domestic tensions about oil projects remain high. However, in the last few years there have been some developments relating to transparency including the Fiscal Responsibility Act, introduced in 2004 by Finance Minister Ngozi Okonjo-Iweala, which was finally approved by the National Assembly and signed into law in late 2007 after being stalled for years in Parliament.¹⁰³

Although not publicly engaged with the IMF, Nigeria's massive oil wealth has finally led to significant attention being paid to transparency of resource revenues. The Nigeria Extractive Industries Transparency Initiative report prepared by an international auditor was published in April 2006 and Nigeria also entered into a Policy Support Instrument with the IMF in October, 2005 (this ended in 2007, around the same time that the Fiscal Responsibility Bill received Parliamentary approval). This Instrument is described by the IMF as a purely voluntary process of a member country in which it signs up for "more frequent Fund assessments" of its economic and financial policies and promotes a "close policy dialogue" between the IMF and the country, with the primary goal of "deliver[ing] clear signals on the strength of these policies".¹⁰⁴ The signals are primarily intended for "outsiders" to the country, as the IMF explains (ibid):

"Signaling" refers to the information that Fund activities can indirectly provide about countries' performances and prospects. Such information can

¹⁰³ (see "Nigeria: Yar'Adua Signs Fiscal Responsibility Bill into Law", *This Day* (Lagos), November 8, 2007, online at <http://allafrica.com/stories/200711090303.html>).

¹⁰⁴ *The Policy Support Instrument* (2007) International Monetary Fund <<http://www.imf.org/external/np/exr/facts/psi.htm>> at 3 October 2008.

be used to inform the decisions of outsiders. Outsiders can include *private creditors*, including banks and bondholders, who are interested in information on the repayment prospects of loans; *official donors and creditors*, both bilateral and multilateral, who may be interested in reassurance about the countries they are supporting; and the public at large.

Soon after the conclusion of its Policy Support Instrument the IMF reported there had been unspecified improvements in institutions relating to fiscal management.¹⁰⁵ The engagement of Nigeria with the IMF in this way suggests that its transparency initiatives are largely directed at outside investors, creditors and donors. Even so, the Nigerian Fiscal Responsibility Bill has been praised by Human Rights Watch,¹⁰⁶ and the Nigerian Budget Monitoring Group.¹⁰⁷ While the new law may represent an important symbolic victory for those advocating fiscal governance reform within the country, it remains to be seen whether this will translate into greater fiscal openness and integrity. The Bill is not yet being released to the public despite its approval in Parliament, and this itself creates concern about transparency and suggests that further challenges may lie ahead with respect to implementation.

India and South Africa: Activism and NGOs driving reform

India, which does not borrow from the IMF, is an example of a more home-grown fiscal transparency reform process. In 2003, the Indian federal Parliament, passed the Fiscal Reform and Budget Management Act. This Act provides a substantive medium-term 3 year fiscal target and reporting requirements for strategies and outcomes for the Central government. Section 6 states that the Central government “shall take suitable measures to ensure greater transparency in its fiscal operations in

¹⁰⁵ IMF Survey, March 2008.

¹⁰⁶ “Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria” (January 2007), at 94-98.

¹⁰⁷ “Fiscal Responsibility Bill: Rising Hopes in the Horizon” (February 26, 2007, at <http://www.budgetmonitoringng.org/Spotlights/2007/02/26/News11618/>); and “Fiscal Responsibility: Don’t Spend Money Unless You Have It”, December 13, 2007, at <http://www.budgetmonitoringng.org/Spotlights/2007/12/13/News12271/>

the public interest and minimise secrecy”. In the IBP’s account, the push for greater budget openness in India started with grass roots civil society organizations tracking misuse of funds by local governments.¹⁰⁸ Yet here, too, the IMF promoted reform of budget practices. In its 2001 fiscal ROSC on India the IMF commented that the country had “achieved a reasonably high level of fiscal transparency”, but that “Enacting the Fiscal Responsibility and Budget Management Bill would be a major step forward given the emphasis it places on achieving a high standard of fiscal transparency.”¹⁰⁹

South Africa: According to one recent study, South Africa ranks above average, and indeed, above the UK, in compliance with OECD *Practices* on fiscal transparency.¹¹⁰ In particular, South Africa has a high ranking in respect of integrity, control and accountability and a reasonable result on budget reports and disclosures. South Africa has a substantial and informative budget website at its National Treasury (www.treasury.gov.za) including People’s Guides to the Budget in Afrikaans, English, Tswana, Xhosa and Zulu and setting out as the core goals of the Treasury the following:

... Supporting efficient and sustainable public financial management is fundamental to the promotion of economic development, good governance, social progress and a rising standard of living for all South Africans. The Constitution of the Republic (Chapter 13) mandates the National Treasury to ensure transparency, accountability and sound financial controls in the management of public finances. ...

¹⁰⁸ Centre on Budget and Policy Priorities, “Access to Budget Information Empowers Citizens in India”, <http://www.openbudgetindex.org/Indianarrative.pdf>. India has an active NGO sector in this area: see, eg, People’s Budget Initiative, *Charter of Budget Demands for Union Budget 2007-08*, Centre for Budget and Governance Accountability, New Delhi.

¹⁰⁹ Statistics Department, “India: Report on Observance of Standards and Codes-Data Module, Response by the Authorities, and Detailed Assessments Using Data Quality Assessment Framework” (Country Report No 04/96, International Monetary Fund, 2004), paras 28-29.

¹¹⁰ Bastida and Benito, above n 3, Figure 1.

Over the current medium-term expenditure framework period (2007 – 2009) the National Treasury will focus on sustaining growth and macroeconomic stability, while accelerating development and the creation of employment opportunities. ...

The high level of fiscal transparency in South Africa seems to have been largely a response to NGO or civil society action during the late 1990s (after establishment of the new state in 1994). The Budget Information Service of the Institute for Democracy in South Africa and the IBP together produced a report on transparency and participation in South Africa's budget process, released in October 1999 and revised in 2000.¹¹¹ Around the same time, during the late 1990s, South Africa succeeded in introducing a medium-term expenditure framework (MTEF), following Australia's example, that remains part of the budgetary process today. We would suggest that the reasons for relative success of implementation of this constraint include its connection with the local activist push for fiscal transparency.¹¹² While South Africa was an early participant in the IMF fiscal ROSC process, this took place later (in 2001) and was not the key influence on South African reform. South Africa now appears to have satisfied the IMF on the transparency score – such that its most recent country report of 2007 does not once mention transparency as an issue or goal.

IV. THE CONTENT OF FISCAL TRANSPARENCY NORMS

Transparency of budgets is generally discussed as a neutral procedural norm that will produce better or more predictable fiscal policy. We argue that transparency standards have more normative content than this suggests, and may serve different constituencies and substantive

¹¹¹ Fölscher, Krafchik and Shapiro, above n 2, 3. The South African report is said to have influenced research in other countries in Eastern Europe, Africa and Latin America: *ibid* 4.

¹¹² Matthew Andrews, "Creating Space for Effective Political Engagement in Development" in Sina Odugbemi and Thomas L Jacobson (eds), *Governance Reform Under Real-World Conditions: Citizens, Stakeholders, and Voice* (2008) 95; and sources cited therein.

policy ends depending on the types of disclosure and processes they require. Analysis of the *IMF Code* reveals a much larger “wishlist” of desirable practices for governance, subsumed under the overall banner of fiscal transparency. While we will not set out exhaustively all of the elements of fiscal transparency as proposed by the various international codes and national laws and policies, it is useful to survey and discuss key elements of the *IMF Code* as the dominant model, as well as selected features of the *OECD Practices*.

A. THE ROLE OF LAW AND STRUCTURE OF GOVERNMENT

The first section of the *IMF Code* (and accompanying Manual) emphasises the “clarity of roles and responsibilities of government”, in particular the establishment of clear and public rules about the structure and fiscal powers and responsibilities of legislative, executive and judicial branches of government; setting out the relationship between government and public corporations; governing the relationship between government and private enterprise and public availability of contractual arrangements. In addition, the Code requires comprehensive, public and understandable budget, tax and other public finance laws, regulations and administrative procedures relating to collection, commitment and use of public funds; the ability to appeal tax and non-tax obligations and an explicitly legal basis for management of government assets and liabilities.

The IMF appears, in this section, to be requiring establishment in member countries of a solid constitutional legal framework for government, together with property and contract rights, in a way that is recognisably “Western” in form. The Code steers clear of requiring “democracy” but it assumes a legislature and the separation of powers including a clear legal basis for the power to tax; a legal basis for resource distribution and public-private contracting; a working judiciary and appeals system; and clear legal definition of public property and public debt. The requirement for clear rules about taxation implicitly assumes private property (as there is then something to tax). Thus, the “legal institutions” of property and contract are embedded in this first part of the Code and the necessity for a clear demarcation of public and private realms inscribes the market into the very structure of the state.

This first section also makes clear that the IMF places considerable emphasis on the role of national laws in securing fiscal transparency. The Code states generally that “[t]he collection, commitment, and use of public funds should be governed by comprehensive budget, tax, and other public finance laws, regulations and administrative procedures.”¹¹³ The implementation Manual more clearly endorses the concept of specific fiscal transparency legislation. Thus, the Code evidences considerable faith in law as delivering the “governance” limb of development and in its use for the formalisation of essentially political and economic processes.

In its *Practices* the OECD notes that some countries have legislated fiscal rules while others have merely adopted policies or guidelines.¹¹⁴ It appears less persuaded than the IMF about the value of law reform per se in the absence of political will, observing that “enforcing fiscal frameworks is a political economy issue as well as a technical one.”¹¹⁵ Nonetheless, it identifies how (as seen in Part 3), fiscal transparency laws have been implemented by many developed and developing countries as a mechanism for improving fiscal discipline and policy outcomes. These arrangements generally support fiscal transparency by providing a clear statement as to policy objectives and the manner in which these will be achieved, including informing the public of fiscal risks. One function of these laws is that they can help to build support for fiscal consolidation, by strengthening the credibility of fiscal policies and by increasing accountability.¹¹⁶

B. BUDGET PROCESS AND FISCAL OBJECTIVES

The second key element of the IMF *Code* is a requirement for “open budget processes following an established timetable and guided by well-defined macroeconomic and fiscal policy objectives” (Item 2). In particular, the Code requires:

- Adequate time for a draft budget to be considered by the legislature;

¹¹³ IMF *Code*, above n 1, s 1.2.1.

¹¹⁴ OECD Best Practices for Budget Transparency, above n 1, Table 3, at 122-123.

¹¹⁵ Joumard et al, above n 19, 130.

¹¹⁶ IMF *Manual* (2007), above n 1, 52.

- A “realistic” budget presented in a medium term framework and an assessment of “fiscal sustainability” setting out the main assumptions and sensitivity analysis (for estimated errors);
- Clear statement of any fiscal targets or rules;
- Description of major expenditure and revenue measures lined to policy objectives and with estimates of impact on the budget and the economy;
- Clear mechanisms for coordination of budget and off-budget activities; and
- An effective accounting system for monitoring and tracking revenues, commitments, liabilities, assets including a timely midyear report and auditing of accounts to be presented to the legislature and published within a year of the budget.

These requirements for open and timely budget information are clearly essential for a legislature, and citizens, to participate adequately in the budget process. Similarly, effective accounting of revenues and the setting out and costing of expenditure goals are crucial. Both of these elements support democratic participation in budgeting as well as donor or lender review of a government’s fiscal position.

The concept of a “realistic” budget appears to relate primarily to the economic assumptions in the budget and assumptions about revenue projections and “targets” set out in multi-year development plans.¹¹⁷ Revenue forecasting, discussed at p. 49 of the Manual, is notoriously difficult even for developed countries, except for the rule of thumb that a good starting point for predicting this year’s revenues is the revenues achieved the year before. Treasuries of developed countries including the UK have been criticised for under-estimating tax revenues, in particular corporate tax;¹¹⁸ developing countries may be too optimistic about revenue estimates, in particular where they are striving to increase “tax effort”. Both tendencies may be political, as well as statistical, at base.

The IMF and OECD also both emphasise the creation of formal procedures taking a substantial period of time including the advance provision of draft budgets and policies (several months before the year

¹¹⁷ Ibid 47-48.

¹¹⁸ See, eg, Emmerson, Frayne and Love, above n 10.

commences); planning over a medium term framework beyond the fiscal year and managing “sustainably” over the long term – this would usually be a time well beyond a normal democratic electoral cycle. In particular, the MTEF (or the similar notion of a medium-term budget framework) has been most often proposed as an external “blueprint” for reform and is argued by the IMF to be essential.

However, even the IMF identifies how difficult establishing a plausible and sustained MTEF can be. The Manual points to success in the UK, Australia, Chile and Brazil. Nonetheless, the IMF underlines the necessity for “stringent conditions”, “robust revenue forecasts” and “rigorous” connections between target expenditures and the expected economic prospects over time, “clearly defined and fully costed policy proposals” and emphasises that a medium-term framework is “most likely to be effective in the context of a real, stable, transparent, and well-publicised commitment to fiscal control”.¹¹⁹ These conditions are very challenging for developing countries with poor systems, staffing and governmental commitment.

It is also interesting to note the mechanisms for coordination of “on budget” and “off budget” items. Clearly, if we see the budget as a central element of democratic governance, expenditures should be largely “on-budget”. However, it is often the case that various items are “off-budget”, such as pension entitlements and special purpose funds. Further, as discussed above, most aid for developing countries is currently delivered off-budget. The very recent shift to putting at least some aid on budget is outlined above. It is laudable that the IMF calls for “a strong interface between the government’s planning or development framework such as the PRSP and its medium-term budget”.¹²⁰ If aid flows are also accounted for in this overall framework, this can improve management and coordination of aid and other revenues and spending. However, on the whole the IMF *Code* cannot address the issue of accountability of aid flows as it is currently drafted; these are outside the scope of its fiscal transparency framework.

¹¹⁹ IMF *Manual* (2007), above n 1, 50.

¹²⁰ *Ibid* 48.

C. PUBLIC BUDGET DOCUMENTATION

The third key element of the IMF *Code* is a requirement for timely publication of all budget documentation and especially of fiscal information. Again, this is to be a “legal obligation” of government. In particular, the IMF would like to see:

- Adherence to release of information in advance and publication of outcomes of at least 2 preceding years and forecasts for at least following 2 years;
- Tax expenditure statements and explanation of quasi-fiscal activity and other fiscal risks;
- Reporting of fiscal data on a gross basis including separate identification of receipts from all revenue sources including taxes, resource-related activities, foreign aid, information about expenditures and information about debt, other significant liabilities (such as pensions) and natural resource assets;
- Reporting of subnational government budgets and public corporation positions;
- A periodic report on long-term public finances;
- Wide distribution of a “clear and simple summary guide” at the time of the annual budget;
- Reporting of overall balance (fiscal deficit or surplus) and gross debt of government for the period; and
- Reporting of results linked to objectives of major budget programs on an annual basis.

In general, few would disagree that making these types of information public benefits a wide range of social interests. However some controversy surrounds the requirement of a report on long-term finances, because of the virtual impossibility of making accurate cost or revenue predictions over a long horizon, creating a risk that such reports will do more to mislead than to inform. Neil Buchanan for instance has argued that long-term forecasting, also known as “generational” accounting, tends to raise false fears that social programs are unaffordable over the long term or will be excessively burdensome to future generations.¹²¹ To this

¹²¹ Neil Buchanan.

we would add that requiring such a report goes beyond simple disclosure to direct what kinds of information fiscal policy makers should gather, analyse and consider, and once again underlines the paramount importance of fiscal prudence and discipline. These values are further reinforced by the need to disclose aggregate budget balance and debt. In contrast, it is striking that neither the *IMF Code* nor the *OECD Practices* call for disclosure of any specific information about the distributive impact of the annual budget or fiscal policy for the *current* population. The content of tax expenditure reports and other public documents is either left to governments to determine, or is weighted toward types of information that will expose any risk of fiscal imbalance.

D. INTEGRITY OF DATA AND BUREAUCRACY

The fourth element of the *IMF Code* incorporates a number of different strands relating to assurance of integrity of data and bureaucracy. The *IMF* calls for integrity measures to assure the quality of fiscal data including forecasts; indication of cash/accrual accounting basis and application of “generally accepted accounting standards” for the public sector in a manner that is internally consistent and reconciled with other data sources. Internal audit of government activities and finances is also proposed, as is external audit of public finances and policies by an independent national audit body and by independent experts, and collection of national statistics by an independent institution. These data and accounting criteria draw heavily on the establishment and dissemination of global accounting standards for both public and private bodies – integrating the “fiscal transparency” norm development process into a wider network of global standards and norms, discussed further in part 7 below.

Under this heading, the *IMF* also calls for clear ethical standards for public servants and publication of their conditions, and in procurement, purchase and sale of public assets and major transactions; for independence of the revenue authority from political direction; for protection of taxpayer rights; and for a requirement on the revenue authority to report regularly to the public. Here, the *IMF Code* overlaps with the very considerable work that has been done in the last decade by the international institutions responding to corruption.

The reference to an independent revenue authority has a long history in IMF and other reform recommendations for developing countries over the last few years. The OECD has recently noted that the establishment of autonomous revenue authorities has been a “high-profile innovation, and a particular focus for donor support”, and about 30 such authorities have now been established in developing countries, mostly in Africa and South America.¹²² However, as the OECD also notes, experience in successfully establishing an “autonomous” agency independent of political interference has been mixed and “early gains have been hard to sustain” (ibid) (South Africa, as in so many other ways, is an exception). As “tax collection cannot be entirely divorced from making tax and budget policy”, reporting lines to the executive government must be carefully established.

Even more recently, a new emphasis on taxpayer rights as opposed merely to strengthening the revenue authority is welcome, as this can help establish a more sound political basis for participation in taxing and spending.¹²³ This seems to be one way in which the IMF has (indirectly) acknowledged the need for active engagement and protection of taxpayers, albeit they propose this in a rather limited context of engagement with the revenue authority rather than the budget process more broadly.

In this Part we have reviewed the main features of the IMF model and have pointed out that it does far more to promote values of fiscal prudence, discipline, and integrity than to support other possible goals of transparency, such as equity or democratic oversight. No one could seriously protest that prudence, discipline and integrity are unimportant – they clearly are imperative to all citizens including those concerned to improve the fairness and democratic oversight of budgets. This is reflected in the fact that independent watchdogs such as IBP in the US and IDASA in South Africa have incorporated many of the IMF’s budget transparency requirements. However as discussed in the next Part these groups have supplemented the IMF standards with criteria of their own

¹²² OECD, *Governance, Taxation and Accountability: Issues and Practices* (2008), accessed at www.oecd.org at 5 October 2008, p. 28

¹²³ Florens Luoga, “Taxpayers” Rights in the Context of Democratic Governance: Tanzania” (2002) 33(3) *Institute of Development Studies Bulletin* 50; and see recent work by the Tax Justice Network on taxpayer rights, www.taxjustice.net .

related to social equality and democracy.

V. FISCAL TRANSPARENCY AND DISTRIBUTIVE JUSTICE

Distributive politics are at the heart of fiscal policy and will often make or break the viability of a reform. For this pragmatic reason if no other, the omission of distributive analysis from the dominant model of fiscal transparency is problematic; but we also consider analysis of distributional impact to be essential for the establishment of fairness in principle.

As already noted there is no requirement in the *IMF Code* or *OECD Practices* for governments to report on how fiscal policy decisions impact different income groups or segments of the population. However in the most recent version of the implementation Manual that accompanies the Code, the IMF does briefly acknowledge that fiscal discipline may involve political tradeoffs that should ideally be disclosed:

Reforms aimed at reducing fiscal deficits and improving macro stability, or at enhancing efficiency, may affect different income and social groups differently, and may hurt or benefit vulnerable and low-income groups more than others. It is important for transparency that some assessment of these impacts be included in the budget documentation...Poverty and Social Impact Analysis (PSIA) refers to the analysis of the distributional impact of policies and policy reforms on the welfare of different groups, with a specific emphasis on the poor and vulnerable...Good practice would require that budget documentation include at least a simple analysis of the differential impacts of new policies

and measures.¹²⁴

The addition of this commentary may reflect the IMF's sensitivity to criticisms of its structural adjustment programs, and the need to acknowledge the social turn in development discourse more often in its own policy advice. However it is important to note that the Manual is 124 pages long (plus glossary and references), and these passages only briefly interrupt an otherwise unrelenting focus on fiscal discipline and integrity. Nor do they impose more than a baseline obligation to include some form of basic analysis. Most importantly, these recommendations are not reflected in the Code itself. The reason may have to do with concerns that this type of information will increase the likelihood of political resistance to tough decisions about spending restraint or taxation, challenging the ability of governments to deliver on their promises of fiscal prudence. As Heald discusses, there is one view that ““too much” transparency produces “over-exposure”, leading to losses of effectiveness through high levels of transaction costs and excessive politicization.”¹²⁵

Not surprisingly, NGOs involved with budget transparency have placed social equity issues higher on the agenda. In developing the IBP Index, the IBP states that IMF standards “do not go far enough to ensure that budgeting is responsive and accountable to citizens.”¹²⁶ To redress this, the IBP's survey questionnaire includes the following questions, to be answered on a transparency scale of 1-5:

55. Does the executive's budget or any supporting budget documentation present information on policies (both proposals and existing commitments) in at least the budget year that are intended to benefit directly the country's most impoverished populations?...

57. Does the executive make available to the

¹²⁴ IMF *Manual* (2007), above n 1, 54-55. The Manual goes on briefly to describe various methods that can be used to carry out PSIA (Box 10).

¹²⁵ David Heald, “Fiscal Transparency: Concepts, Measurement and U.K. Practice”, (2003) 81:4 *Public Administration* 723-759, at 727, citing V. Tanzi, “Corruption around the world”, 45 *IMF Staff Papers* (1998) 559-94.

¹²⁶ IBP Index, above n *, p. 3.

public an analysis of the distribution of the tax burden?...

66. Are citizens able in practice to obtain non-financial information related to expenditures (for example, number of beneficiaries, number of persons employed by the program, etc.) for individual programs in a format that is more highly disaggregated than that which appears in the executive's budget proposal if they request it from a ministry or agency?...

110. Does the year-end report, or another document released to public by the executive...explain the difference between the enacted level of funds intended to benefit directly the country's most impoverished populations and the actual outcome?...¹²⁷

In addition the IBP asks numerous questions about availability of information to citizens and recommends that the right to obtain not only budget documents but also detailed information about particular program expenditures at the local level should be established by legislation.¹²⁸

An earlier 2001 study of budget transparency in Latin American countries also highlighted the connection of transparency to social equity, stating that "knowledge and analysis of the budget should be sufficient to make it possible for the external observers to verify whether the distribution of...resources and their application reflect social preferences and comply with the criteria of equality and justice".¹²⁹ Notably, however, that survey instrument did not include direct questions about the

¹²⁷ The survey questionnaire with country responses is available online at <http://www.openbudgetindex.org/#CountrySummariesandQuestionnaires>.

¹²⁸ See for example the Open Budget Initiative summary report, at 19-20.

¹²⁹ *Index of Budget Transparency in Five Latin American Countries: Argentina, Brazil, Chile, Mexico and Peru* (no publisher or date, available online at <http://internationalbudget.org/resources/LAbudtrans.pdf>), above n *, p. 11. This study was facilitated in part by the IBP but conducted independently by the Latin American partners.

availability of distributive information related to budget policies. These issues were addressed indirectly instead, through numerous questions about citizen access to and influence over the budget process. This approach has remained consistent in two follow-up studies, the most recent of which adopts a more politically neutral definition of transparency but also states that “applied budget analysis...makes it possible to evaluate who wins and who loses with the distribution of public resources.”¹³⁰

In South Africa, the collaborative 1999 study by the IBP and IDASA included among its many findings that “analysis of tax incidence is lacking”¹³¹ in South Africa’s budget documentation. The report also recommended that detailed information on spending allocations be provided to Parliament earlier in the budget process.¹³² It described the limited but growing role of civil society groups in meeting with Parliamentary committees for example to discuss priorities of low income people and women, as well as a range of sectoral social welfare issues, and cited the lack of consistent and detailed data as a barrier to civil society oversight of budgets.¹³³

Like the IMF and OECD, these NGOs have attempted to articulate universal standards of fiscal transparency that can be applied to evaluate country practice and create pressure for reform. The NGOs have taken some modest steps to add a distributive lens to the assessment of fiscal transparency, while also confirming the importance of reliable information regarding the government’s fiscal prudence and integrity.

Budget transparency legislation at the country level has tended to track the IMF/OECD model, meaning that it makes no explicit reference to social justice indicators. The Australian *Charter* does not make an assessment of distributional impact or fairness of current generations but only of future ones. One exception is the UK Code for Fiscal Stability

¹³⁰ *Latin American Index of Budget Transparency 2005: A comparison of 8 countries* (Managua, Nicaragua: October 2005), at 7; and *Latin American Index of Budget Transparency 2003: A comparison of 10 countries* (November 2003), at 5 (online at <http://www.internationalbudget.org/themes/BudTrans/English.pdf>).

¹³¹ *Ibid.*, at 21.

¹³² *Ibid.*, at 46.

¹³³ *Ibid.*, at 49-51. Note that this project led to a further study of budget transparency in several African countries: cite.

which includes “fairness” as one of the principles that must govern fiscal policy, and defines this as follows:

The principle of fairness means that, so far as reasonably practical, the Government shall seek to operate fiscal policy in a way that takes into account the financial effects on future generations, as well as its distributional impact on the current population.¹³⁴

The first part of this definition, the mandate to consider future generations, relates back to the issue of sustainability and the need for discipline over current social spending. However the reference to fairness within the current generation creates at least an opening for scrutiny of the distributive impact of budgets. This potential is not realized in practice, because none of the public reports that the government must issue under the Code are required to include a distributional analysis. Emmerson et al (2004) report that the UK Treasury has on some occasions provided information about the impact of its proposals on different income groups.¹³⁵ They recommend making this mandatory:

There is no reason why the Code...should not contain an explicit requirement that, where significant and possible, the distributional impact on the current population of new measures should be made publicly available. Similarly estimates of the impact on marginal deduction rates across the whole population should also be provided...It is also desirable that indicative information be provided as early as possible in the consultation

¹³⁴ Finance Act 1998, s.155(2); and Code for Fiscal Stability, paragraph 7. The other principles governing fiscal policy are transparency, stability, responsibility and efficiency. For another example see the province of Ontario, Canada’s *Fiscal Transparency and Accountability Act, 2004*, S.O. 2004, c.27, s.2, which includes “equity” among the principles governing fiscal policy in the province. For discussion of this legislation see Mary Condon and Lisa Philipps, “Transnational Market Governance and Economic Citizenship: New Frontiers for Feminist Legal Theory”, (2005) 28 *Thomas Jefferson Law Review* 105-150, at 139-149.

¹³⁵ Emmerson, Frayne and Love, above n 10, 29.

process rather than simply being provided when all of the details of the policy have been finalised.¹³⁶

The obvious problem with giving governments discretion to publish such information selectively is that they will tend to do so only when it is politically convenient. Even if distributive analyses were to be required for all new policies, there is a further concern about how to ensure a degree of rigour and objectivity in the way such data are presented. This points to the need for effective oversight of the executive by legislative and civil society actors, which we discuss in the next Part.

In Pakistan, the transparency provisions of the Fiscal Responsibility and Debt Limitation Act 2005 are based on the IMF model and do not require disclosure of any distributional data. However equity issues are addressed in a different way, by making the statute's deficit and debt reduction targets subject to an exception for "social and poverty alleviation related expenditures," which are not to fall below 4.5% of GDP in any given year.¹³⁷ The term "social and poverty related expenditure" is defined to include, inter alia, health, education and "such other expenditures as may be specified in the National Poverty Reduction Strategy Paper from time to time."¹³⁸ The government must report on its compliance with these objectives in an annual fiscal policy statement, meaning that some account must be given as to the amount of budgetary spending which qualifies as "social and poverty related".¹³⁹ The IBP reported in 2006 that Pakistan's budget did include some information "highlighting the impact of key policies intended to alleviate poverty", though some details were excluded.¹⁴⁰ By contrast, the government did not provide any analysis of the distribution of the tax burden.¹⁴¹ The UK

¹³⁶ Ibid.

¹³⁷ s.3. This provision also states that education and health related expenditures should double as a percentage of GDP over 10 years. See also s.9 which protects social and poverty alleviation spending from any cuts that must be made to meet deficit and debt targets.

¹³⁸ s.2(1).

¹³⁹ ss.4, 6.

¹⁴⁰ IBP, Open Budget Questionnaire, Pakistan (Q.55). The country received a "B" rating on this point.

¹⁴¹ Q57.

received an “A” grade in both these areas.¹⁴²

Tax expenditures are one aspect of fiscal policy that cries out for more open distributive analysis. The IMF *Code* recommends that tax expenditures be reported in the budget documents but does not prescribe exactly what information should be reported about them.¹⁴³ It is common, particularly for developed countries, to provide a report of some kind concerning tax expenditures compared to a defined baseline “normal” income or consumption tax; this is required in the Australian *Charter*.¹⁴⁴ However, the reports are frequently not well integrated into the budget process, contain inadequate estimates of revenue foregone, and contain little or no evidence about the distributive impact of particular tax concessions.¹⁴⁵ This weakens their usefulness in improving transparency.

Tax expenditure reporting could be strengthened significantly in developed and developing countries to illuminate the benefits received by different social groups and firms. India began releasing tax expenditure reports with its 2006-07 budget, and in 2008-09 included a distributive analysis of corporate tax expenditures showing that the smallest firms were receiving the least benefit from these concessions.¹⁴⁶ This type of initiative could help build support for base-broadening reforms in developing countries, which has been identified as crucial in order to increase the resources available for anti-poverty and other development

¹⁴² IBP, Open Budget Questionnaire, United Kingdom (Q.55 and 57).

¹⁴³ IMB Code, *. Since its establishment by Stanley Surrey in the United States during the 1960s, the concept of tax expenditures, which compares the income tax law with a “benchmark” income tax said to be an ideal income tax system, has had a primary political purpose, to draw legislators’ attention to the many concessions, exemptions and other incentives in the US tax code and to the implicit “cost to revenue”, or revenue foregone, as a result of these concessions. For all of the flaws that can be identified with respect to the tax expenditure concept, this is still its most valuable function and it is thus best understood as a strategic intervention into the budget process.

¹⁴⁴ Cl 12

¹⁴⁵ Swift et al, 2004; Boadway 2007; Mark Burton; Julie Smith (2004)

¹⁴⁶ See Ministry of Finance, India, *Union Budget 2006-07*, Receipts Budget, Annex 12, “Tax Expenditure under the Central Tax System: Financial Year 2004-05” (online at <http://indiabudget.nic.in/ub2006-07/rec/annex12.pdf>); and Ministry of Finance, India, *Union Budget 2008-09*, Receipts Budget, Annex 12, “Revenue foregone under the Central Tax System: Financial Years 2006-07 and 2007-08” (online at <http://indiabudget.nic.in/ub2008-09/rec/annex12.pdf>)

spending. Moreover, we suggest that this strategy could have some advantages over others that focus on reducing tax competition through more international coordination of tax policy.

Many international tax scholars have criticized the ill-considered use of investment tax incentives by developing countries, pointing out negative effects on corporate tax revenue and on the efficiency and fairness of tax systems.¹⁴⁷ The persistence of this form of tax competition has led some to recommend changes in the way developed countries tax business income earned abroad by their resident multi-nationals, to eliminate any benefits from host country tax incentives, thereby freeing those countries from pressure to engage in self-destructive tax competition.¹⁴⁸ Others have argued just the opposite, that developed countries should engage in more tax sparing to preserve the value of these incentives, on the basis this may help developing countries to attract much needed investment, as well as according them greater autonomy over domestic tax policy.¹⁴⁹ Promoting more transparency at the country level with respect to the cost and distributive impact of tax expenditures could help to resolve this impasse by enabling the country's own citizens to challenge incentives that shift the burden of taxation onto local firms and individuals without achieving any clear benefits. Similarly in developed countries, tax expenditures have grown rapidly as a favoured mechanism for delivering social programs. A perpetual criticism of this trend is the way it tends to hide the distribution of costs and benefits. Requiring that an analysis of these effects be made public with the budget would radically increase the transparency of fiscal policy overall.

The gender budgeting initiatives that have been undertaken in several countries, including India and South Africa, provide yet another angle on distributive transparency.¹⁵⁰ The Platform of Action adopted at the United Nations Fourth World Conference on Women in Beijing (1995) called on governments to "facilitate, at appropriate levels, more open and transparent budget processes"¹⁵¹ and mandated "the integration of a gender

¹⁴⁷ eg Vann; Keene and Simone; Kim Brooks

¹⁴⁸ eg Avi-Yonah 2008

¹⁴⁹ eg Margoliath; Karen Brown

¹⁵⁰ See, eg, What does budget 2007-2008 offer women?. *Economic and Political Weekly*. 42(16); 21-27 April 2007. p.1423-1428

¹⁵¹ Cl. 165(i)

perspective in budgetary decisions on policies and programmes”.¹⁵² The UN and other international agencies then organized to support many local gender budgeting projects at both the civil society and governmental level.¹⁵³

The basic starting point of these projects is that fiscal policy often purports to be gender neutral on its face, but its impact is seldom gender neutral because of the different economic status and roles of men and women. A variety of methods are used to reveal and analyse the differential impacts of taxes and spending on women and men, in terms of both the distribution of costs and benefits, and behavioural effects (for example marginal choices between paid and unpaid labour, or the effectiveness of business incentives). In addition, many initiatives focus on increasing women’s participation in budget processes as well as the capacity of civil society organizations to critically analyse budget documents from a gender perspective. Advocates of gender budgeting often use the language of transparency in describing its value. In particular, we note that the UN Financing for Development conference has recently emphasized the importance of including a gender lens in the analysis of fiscal policy.¹⁵⁴ This sits in stark contrast with the standards of transparency articulated by the IMF and OECD, which do not mention gender impact as a relevant fact to be reported on by governments. Nor does gender receive any explicit mention in the NGO-led budget transparency exercises, with the exception of the IBP/IDASA report.

VI. FISCAL TRANSPARENCY AND DEMOCRATIC EMPOWERMENT

The interventions of the IMF and OECD on budget transparency, discussed above, raise concerns about a democratic deficit with respect to fiscal policy, as these actors are most concerned to promote fiscal

¹⁵² Cl. 345

¹⁵³ For discussion see Lisa Philipps, “Gender Budgets and Tax Policy-making: Contrasting Canadian and Australian Experiences” (2006) 24(2) *Law in Context* 143; *The Official Report of the Fourth World Conference on Women containing the Beijing Declaration and Platform for Action* UN Doc A/CONF.177/20 (1995); Janet Stotsky (IMF).

¹⁵⁴ Draft Outcomes of the Doha Financing For Development conference.

discipline and capital market efficiency, and less aware of or concerned with distributive and other impacts on local populations.¹⁵⁵ This democratic deficit relates both to the expected audience for fiscal transparency and the overall understanding of the purpose and processes of budgeting. If the budget is, as the OECD suggests, the most important policy document of a government, the question of who receives information and is empowered to participate is crucial for the legitimacy, fairness and sustainability of budget decisions.

The IMF *Code* itself does not state who the expected audience is of fiscal information but the Manual states that transparency involves openness to “the public” about “the structure and functions of government, fiscal policy intentions, public sector accounts, and fiscal projections”.¹⁵⁶ The “public”, as understood by the Manual, incorporates four distinct audiences. First, governments themselves (past, current and future) to assist in improving economic decision-making. Second, “citizens ... giving them the information they need to hold their government accountable for its policy choices”. Third, “international capital markets”. Last but not least, the IMF itself, in its role in economic “surveillance” of member countries “to assess economic vulnerabilities”.¹⁵⁷

The explicit recognition of citizens in the IMF Manual is a significant change from the first edition released in 1998, which emphasised “surveillance of economic policies by country authorities, financial markets, and international institutions”.¹⁵⁸ Indeed, a Note to the previous edition commented that “there is an issue” as to the language(s) in which information should be made available and even suggests that it is “unclear” whether countries should routinely publish fiscal information “in a commonly-used” national language; it was considered at that time much more important that “outsiders following a country” should be able to understand the Budget, in particular for “countries seeking access to

¹⁵⁵ Alkoby paper and literature discussed in it. Note that we are dealing with an area of policy making that is already prone to democratic deficits at the national level: Philipps, *, Stewart, *.

¹⁵⁶ IMF *Manual* (2007), above n 1, para 15, p. 13

¹⁵⁷ *Ibid*, paras 2 and 3 p. 8

¹⁵⁸ IMF *Manual*, 1998, para *.

international capital markets”.¹⁵⁹ The OECD *Practices* address the role of citizens also, in particular by requiring publication of reports and active promotion of an understanding of the budget process by citizens and NGOs.¹⁶⁰ However, the most important way in which both the IMF *Code* and OECD *Practices* see accountability to citizens being achieved is, not surprisingly, through the institutional mechanisms of legislative review of an executive budget.¹⁶¹

While they consider accountability to the legislature important, the IBP and other NGOs involved in budget assessment have a different vision of democratic control over fiscal processes. The IBP Open Budget Initiative is explicitly oriented to empowering relatively disadvantaged constituencies to engage with budgetary policy, though it is also concerned to expose fiscal corruption or unrealistic and imprudent budgeting. NGO researchers in Latin America put the issue as follows:

“Participation by the citizenry throughout the budget process is indispensable, not only to strengthen the democracy of a country, but also because it represents an effective way to ensure that the population’s most pressing needs are covered within the government’s budget.”¹⁶²

They also find that citizen participation receives the lowest score of any of the variables in their Index.

In spite of the acknowledgement in fiscal transparency laws and codes of the role of the legislature, it is relatively rare for discussion about transparency and the legislature to explicitly identify the political nature – involving compromise and negotiation – of budgets themselves. Furthermore, while it is generally considered that one role of the legislature – and of fiscal rules imposed by it – is to constrain the executive from undisciplined spending and taxing, much discussion about

¹⁵⁹ Previous IMF Manual on Fiscal Transparency, para 57 and note 49, available from <http://www.imf.org/external/np/fad/trans/manual/sec02a.htm>.

¹⁶⁰ Page 4

¹⁶¹ OECD Practices, cl. 1.1, 3.4; IMF Code, items 2.1.1, 4.3.2.

¹⁶² Latin American Index of Budget Transparency 2005, p. 16.

budget decision-making, in particular concerning fiscal discipline, seeks to constrain the legislature by institutionalising, if possible, a strong leader in the government.¹⁶³ The common factor is not accountability (of one branch of government to another) but fiscal discipline to establish credibility for the market.¹⁶⁴

If we refocus the discussion towards the fundamental purpose of a budget, being to establish politically legitimate and sustainable distributional decisions for a country, we can also rethink the meaning and uses of fiscal transparency. Fiscal transparency norms have the potential to expand the political space for budget decision-making, by expanding the ability of citizens to participate in government decision-making beyond the power to vote for representatives in a legislature over an electoral cycle. Effective fiscal transparency norms could operate to connect fiscal policy-makers with existing networks of governmental departments, business, civil society and local communities so as to more effectively design, assess and implement fiscal decisions. Transparency norms and frameworks should seek to increase the knowledge of ordinary citizens, NGOs and “civil society” generally about fiscal policy decisions and their impact on the distribution of benefits and burdens throughout society.

The use of fiscal transparency norms to increase participation would fit with a global trend to encourage increased public participation in policy-making generally. As a broad principle, the UN has stated that “widespread participation in decision-making processes” is important in enabling “the creation of the critical mass of support needed to change institutions”.¹⁶⁵ Indeed, in what has been called a “paradigm” shift for development policy in many developing countries, the second half of the

¹⁶³ See, eg, Alesina and Perotti, above n. *, IMF Manual emphasising executive control, p. *.

¹⁶⁴ A recent insightful article about fiscal reform in Chile, presented as part of a joint OECD/Organisation of American States forum on public sector transparency, emphasises the combined macroeconomic, managerial and political role of budgets and the need, in the longer term, to establish a political consensus through increasing and strengthening the contributions of the Congress, in addition to a strong government leader and imposing a strict fiscal rule: Mario Marcel and Marcelo Tokman, “Building a consensus for fiscal reform in Chile” in OECD, *Public Sector Transparency*, above n. *, 107-123, at p. 108.

¹⁶⁵ United Nations, *World Economic and Social Survey 2000*, Department of International Economics and Social Affairs UN Doc ST/ESA/273, p. *.

1990s saw a massive enhancement of consultation in relation to expenditure policies to generate and implement PRSPs associated with conditional loans from the IMF and the World Bank and aid funding from donors.¹⁶⁶ A concept of “participatory development” has become the norm, at least as a matter of rhetoric, in the broader development discourse whether carried out by multilateral development agencies or non-government organisations.¹⁶⁷

Critics have suggested that the participatory debate has not been expanded, in particular in respect of macroeconomic policy (including fiscal policy) and that policy discussions and decision-making processes are not well-embedded in existing political structures such as the parliament.¹⁶⁸ Nonetheless, a recent evaluation of PRSPs and their interaction with budget formation, examining case studies of Tanzania Burkina Faso, Bolivia, Vietnam and Cambodia, concluded that PRSPs have enhanced public education about government policies and expenditures and, to some extent, participation in budget processes.¹⁶⁹

Though it speaks directly to fiscal policy choices, the PRSP process has been criticised as being insufficiently linked to the budget.¹⁷⁰ The study of Alonso et al observes that the Ministry of Finance is not always given a lead role in the PRSP process, which may often be established in a separate ministry.¹⁷¹ This separation of the PRSP policy framework from the budget is likely to lead to a failure of “ownership” by the Ministry of Finance of the PRSP process as well as a failure to link the

¹⁶⁶ Fantu Cheru, “Building and supporting PRSPs in Africa: what has worked well so far? What needs changing?” (2006) 27(2) *Third World Quarterly* 355-376, p. *.

¹⁶⁷ Maia Green, “Participatory development and the appropriation of agency in Southern Tanzania” (2000) 20(1) *Critique of Anthropology* 67-89; see, eg. D Narayan and L Srinivasan, *Participatory Development Took Kit: Materials to Facilitate Community Empowerment* (1994, World Bank: Washington DC).

¹⁶⁸ Eg, Andrew Sumner “In search of the post-Washington (Dis)consensus: the “missing” content of PRSPs” (2006) 27(8) *Third World Quarterly* 1401-1412; Morrison and Singer, above n *.

¹⁶⁹ Rosa Alonso, Lindsay Judge and Jeni Klugman, “PRSPs and Budgets: A Synthesis of Five Case Studies” in Stefan Koeberle, Zoran Stavreski and Jan Walliser (eds), *Budget support as more effective aid? Recent experiences and emerging lessons* (2006, World Bank: Washington DC). 155-192, p. 159.

¹⁷⁰ Stevens, above n 9, 8-9.

¹⁷¹ *Ibid.*, p. 166.

PRSP properly to taxing and budgetary spending. That “weak link between the PRSP and the budgets” is identified as a crucial problem in many countries; the solution seems to be a MTEF but establishing one successfully is, as outlined above, very challenging.¹⁷² Problems also arise with a failure to ensure that local governments participate in both PRSP formulation and budget decisions at a national level, although PRSPs are supposed to be driven by local community consultation and tax systems are increasingly decentralised. A further issue is that it is rare for consultation in a PRSP process to involve discussion of the taxation side of the budget. Attention needs to be paid to what “mechanisms of accountability” could incorporate the poor into the tax reform debate and “enhance their ability to articulate their interests and advance a progressive system of public finance, both in taxation and expenditures”.¹⁷³ The disconnect between participation in the PRSP process and the budget process is an indication of the inadequacy of content of fiscal transparency norms which have tended to focus heavily on demonstrating prudence and discipline, rather than the equity or legitimacy of budgetary policy.

Consultative exercises have also become popular in many countries as a means of securing political support for tax reform.¹⁷⁴ The IMF *Code* calls for adequate consultation in reform,¹⁷⁵ but surprisingly the OECD does not. In particular in developed countries, consultation about the technical or detailed policy elements or content of tax reform is frequently carried out with the private sector, in particular business groups and tax professional advisers, on aspects of policy or on the way a tax law or policy is implemented or administered, and less often with a broad spectrum of taxpayers.¹⁷⁶ If such consultation is too targeted to particular

¹⁷² Fantu Cheru, above n *, p. 362

¹⁷³ Sabates and Schneider, *Seminar Report*, DfID and World Bank Taxation Seminar, at the Centre for the Future State (Overseas Development Institute, University of Surrey, October 31–November 1, 2002, *Taxation, Accountability and the Poor*, p.5; and see Alonso et al, above n. *, p. 162.

¹⁷⁴ See Cedric Sandford, *Successful Tax Reform: Lessons from an Analysis of Tax Reform in Six Countries* (Bath: Fiscal Publications, 1993); Thomas E. McDonnell, “Toward Getting it Right: Reflections on 50 years of the Tax Legislative Process in Canada” (1995) 95:5 Cdn.Tax J. 1131...

¹⁷⁵ Article 1.2.3.

¹⁷⁶ Richard K Gordon and Victor Thuronyi observe that little attention has been paid to the process of designing and drafting tax legislation in developing countries, with a few

business sectors or taxpayers, it may blur into the “thin” politics of taxation as described by Moore and Rakner, which may essentially comprises special interest negotiating behind closed doors; even where more public and institutionalised, as in the “tax policy network” identified by Stewart in respect of taxation of the corporate sector in Australia, this network is not open to broader citizen engagement.¹⁷⁷ Ideally, a fiscal transparency law would build institutional procedures and mechanisms that would help to ensure that consultation in policy formation is public to the extent possible and that enable a wide range of taxpayers an opportunity to engage in the process.

A range of problems can arise with the implementation of these recommendations in many countries, however. A lack of consultation on tax reform seems often to go hand in hand with a failure to respect taxpayer rights and procedural or appeal processes in respect of taxation.¹⁷⁸ In this context, the IMF *Code’s* incorporation of a requirement to ensure taxpayer rights and due process is likely to increase taxpayer capacity to engage in tax reform processes, though it is somewhat indirect. Business and taxpayer associations may not exist or may be poorly educated or resourced. There is often a need for “skilling up” both parliamentarians and the wider population so as to enable them to participate in consultation about tax reforms that affect them and the broader public interest. Gordon and Thuronyi have also identified inadequate coordination between the legislative branch and tax policy makers in the Treasury or executive branch; they argue that it is important both to educate and to consult with members of parliament, perhaps by the mechanism of a parliamentary committee and with parliamentary staff,

notable exceptions: “Tax Legislative Process”, in Victor Thuronyi (ed), *Tax Law Design and Drafting* (Vol 1, 1996: IMF, Washington DC), p. *. Advantages of such consultation may include provision of an external, expert eye to identify issues, uncertainties or problems with the law; the provision of examples and information about taxpayer practices, accounting and other compliance issues; and ensuring professional or business support for tax legislation and its effective implementation which is likely to be politically important.

¹⁷⁷ Moore & Rakner, *; Stewart, * (2008).

¹⁷⁸ See, eg. Florens Luoga, “Taxpayers” Rights in the Context of Democratic governance” (2002) 33(3) *IDS Bulletin* 50, referring to more than 12 studies of the Tanzanian tax system since 1990, none of which addressed the need for consultation or the legal framework for taxation.

although this will depend on institutional arrangements in each country.¹⁷⁹ Formal interest groups and business associations may be weak or subject to co-option, so that there is inadequate demand for broad consultation and influence by smaller groups is hidden.¹⁸⁰

The claim in support of consultation in both tax and expenditure policy is that it enhances information-sharing, accountability, institutional knowledge and public understanding, and this will in turn strengthen the quality and legitimacy of tax policy. Often, however, there is an assumed dichotomy between *content* and *process* in fiscal policy reform. It is implicit that a particular technical tax or spending reform as defined by experts can be implemented more effectively if better processes are in place. This implicit assumption is consistent with what has been termed the “technical idea” approach to a development intervention, used across the broad field of development, in which “effective political engagement is evidenced by receptivity to the technical idea and support of its implementation”.¹⁸¹ However, the serious implementation of process-oriented reforms is likely to lead to changes – indeed, significant compromises - in the ultimate content of tax and spending proposals. Here again, the discourse of transparency reflects an underlying tension between the drive for fiscal discipline, on the one hand, and the desire to achieve a legitimate fiscal bargain among citizens on the other.¹⁸²

The IBP forms part of an emergent NGO/civil society network that aims to fill this democratic deficit, but confronts many barriers. It operates at both the domestic and international levels, with limited communication and coherence among different participants. The importance of civil society or independent critique of budget policy has been noted in a variety of contexts including tax expenditures and gender budgeting, discussed above. Without external monitoring and pressure, governments are unlikely to engage in meaningful disclosure or self-criticism of their policies. However the challenges of developing a civil society network that is both socially diverse and well-informed about

¹⁷⁹ Ibid., p. 8.

¹⁸⁰ Lise Rakner, “The Politics of Revenue Mobilisation: Explaining Continuity in Namibian Tax Policies” (2001) 1 *Forum for Development Studies* 125, p. 135.

¹⁸¹ Andrews (2008)

¹⁸² See, eg, Stewart [on Ghana VAT reform], *

fiscal policy are also well known. We argue that the international codes fail to prioritize information or processes that would serve economically marginalized groups in the wider civil society, or foster critical analysis by those interested in problems of poverty and inequality.

An alternative view of a successful development intervention by international experts or institutions, which is targeted towards local “ownership” and warns against the wholesale implementation of external technical ideas or blueprints without adequate local consideration, is suggested by Andrews to involve the creation of “space in which the developing entity can identify, define, and solve its own problems”.¹⁸³ The dominant fiscal transparency norms, while acknowledging the importance of accountability to legislatures, are not aimed at creating “space” for political negotiation or engagement in the budget, even where the international institutions have elsewhere begun to pay increased attention to citizen participation. Just as there is a significant gap between stated goals of country ownership and coordinating aid and loan funding expenditures and their actual integration into recipient country budgets, there is also a significant gap between the global institutional statements concerning policy participation generally, and the specific processes instituted and encouraged in the context of fiscal policy.

This gap is illustrated by comparing the OECD’s approach to fiscal transparency, which considers participation only marginally and the considerable attention paid by the OECD in recent years to public participation in government policy-making more generally in member states.¹⁸⁴ The OECD distinguishes between *information* – “a one-way relationship in which government produces and delivers information for use by citizens”, *consultation* – “a two-way relationship in which citizens provide feedback to government” on a defined issue, and *active participation* – “a relation based on partnership with government, in which citizens actively engage in defining the process and content of policy-making”.¹⁸⁵ It seems safe to say that most efforts at engaging citizens in

¹⁸³ Andrews (2008); and see Rodrik, Andrews (2004)

¹⁸⁴ OECD, *Citizens as Partners: Information consultation and active participation in policy making* (2001); OECD, *Evaluating public participation in policy making* (2005).

¹⁸⁵ OECD, *Citizens as Partners*, *ibid.*, p. 23. Some commentators have called for increased and more widespread participation in tax policy making: see Mark Burton “Towards Participatory Tax Transparency” (2006) * *Tax Notes International* *, “Democratic Tax

tax reform efforts or budget processes do not rise to the third level of active participation.

Calls for “political space” and for increased citizen participation in fiscal policy (and other policy aimed at development) tend to be grounded in a notion of “deliberative democracy”.¹⁸⁶ Philip Pettit has argued for deliberative democracy combining two dimensions: first, representative “contestatory institutions” and second, institutions that remove some decisions from the immediately political domain but which are designed to empower participation.¹⁸⁷ Relevantly to our discussion of budget transparency, the “contestatory institutions” ensure that “the people” are “individually enabled to act as editors of the laws and policies that the representatives author – and author in their collective name” while on the other hand, the “depoliticising” institutions to “reduce” the “contestatory burden”, including constitutional constraints and consultative procedures.¹⁸⁸

At their best, fiscal transparency laws and other laws relating to budgeting would empower “contestation” – participation in fiscal decision-making – through informing and enabling citizens – while at the same time providing adequate constraints and procedures to enable “realistic” outcomes to be achieved. These constraints could include, say,

Administration” in Margaret McKerchar and Michael Walpole (eds), *More Issues in Global Tax Administration* (*, Fiscal Publications: Bath); in contrast to the call for widespread “citizen” participation, Stewart has found that enhanced consultation in business tax policy making in Australia has certainly strengthened a “shared ownership” of the tax system between business and government but within a closed and tightly held “network” of interdependence that does not incorporate citizens or civil society more broadly: Stewart (2008) in Cooper, Graeme (ed), *Executing the Income Tax* (Australian Tax Research Foundation: *), p. *.

¹⁸⁶ Although with a longer history in democratic theory (in particular sourced in Habermas), the theory around deliberative democracy seems in fact to be being made simultaneously with the various experiments with participation and consultation taking place in development and policy practice: see, eg, Elster, J (ed) *Deliberative Democracy* (1998) (Cambridge: Cambridge University Press); A Hamlin and P Pettit (eds), *The Good Polity: Normative Analysis of the State* (NY: Basil Blackwell). In the development context, it has been termed “deliberative development”: see, eg, Kevin M Morrison and Matthew M Singer, “Inequality and Deliberative Development: Revisiting Bolivia’s Experience with the PRSP” (2007) 25(6) *Development Policy Review* 721-740.

¹⁸⁷ Philip Pettit, “Depoliticizing Democracy” (2004) 17(1) *Ratio Juris* 52-65

¹⁸⁸ Pettit, 2004, p. 61-63.

the use of a MTEF; and requirements to assess the achievement of development goals and to weigh distributive impact on both current and future generations. We call on the IFIs to turn their attention to fostering such “contestatory” processes and networks both locally within countries and internationally. What best practices could be identified at the country level with respect to inclusion and resourcing of civil society participants? Could transparency be broadened by promoting more effective Parliamentary oversight of fiscal policy impacts including the wider use of committees and local community consultations?

VII. FORMALISATION, META-INSTITUTIONS AND GLOBAL NORMS

This paper has sought to analyse and critique budget transparency laws through a lens of social justice and democratic values. In this final part, we discuss the role of law in the network of codes, standards and regulators dealing with fiscal transparency that we have identified as operating at both an international and national level and the import of fiscal transparency for the broader project of “ruling the world”. Our analysis suggests that the international institutions and even NGOs (such as IBP) put considerable faith in law as a vehicle for mandating transparency and accountability. However, scholars of law and development have expressed scepticism about the role of law in development and the ability of law reform to enhance or influence development.¹⁸⁹

The IMF *Code* and OECD Practices are prime examples of the increasing role of “soft law” in transnational economic governance – standards or norms developed by quasi-public international institutions, with a view to influencing policy development and practice at the state level so as to convince markets of sound economic policy-making.¹⁹⁰ They are just one element of a broader network of standards and codes at the international level aimed at establishing “good governance” norms so as to

¹⁸⁹ Davis, Kevin and Michael Trebilcock, “The relationship between law and development: optimists versus skeptics” *forthcoming* in *American Journal of Comparative Law* (April 21, 2008).

¹⁹⁰ Note, Allison Christians, “hard law and soft law” in international taxation (2007); Schick, “hard rules” for fiscal restraint.

achieve “macroeconomic stability and high-quality growth”.¹⁹¹ Even the “hardest” of the global rules, the Maastricht fiscal constraint for the euro area, have been relaxed into predominantly procedural and reporting requirements, while at the same time the European Commission has sought to maintain the credibility of a strict commitment to tight fiscal policy so as to support the Euro currency.

As the IMF Manual notes, the *Code* is “one of 12 standards that have been recognised by the international community” (and endorsed by the IMF and the World Bank) concerning governance in various guises.¹⁹² The Code is also supported by private sector investors as one of 12 key international standards deserving of priority implementation by governments.¹⁹³ The OECD *Practices* form an element of its overall *Policy Framework for Investment* (11 May 2006) which proposes 10 policy “domains” that have the most impact on investment, sets out questions or issues for governments to consider in each domain and seeks to “help to define the respective responsibilities of government, business and other stakeholders and to pinpoint where international co-operation can most effectively redress weaknesses in the investment environment”.¹⁹⁴ Transparency in policy development and implementation is one of three core principles that underlie the framework, together with a notion of “policy coherence” and regular evaluation of the impact of policies.

In terms of expenditures, the expansion of efforts in respect of expenditure transparency is a part of the World Bank’s wider efforts in monitoring and implementing “governance” reforms worldwide, epitomised by the *Governance Indicators* published by the Bank and the

¹⁹¹ IMF *Manual* (2007), above n 1, para 1, p. 8

¹⁹² See <http://www.imf.org/external/standards/index.htm>

¹⁹³ *12 Key Standards for Sound Financial Systems* (1999) Financial Stability Forum <http://www.fsforum.org/cos/key_standards.htm> at 10 October 2008.

¹⁹⁴ OECD, *Policy Framework for Investment*, above n 63, 7. One question that arises is to what extent non-government actors, in particular transnational corporations (but also, increasingly, charities, NGOs and the international institutions themselves) are also called upon to be “transparent”. It is arguable that transnational corporations face much lower expectations of transparency despite their very significant impact on the economy and society, although it must be noted that transparency norms are also being urged on the corporate sector by the OECD and, of course, by national regulators.

World Bank Institute that seek to measure governance quality across six dimensions and 212 countries and territories.¹⁹⁵ Most of these dimensions could incorporate fiscal transparency but it has not always been the subject of attention (the categories are: “Voice and Accountability”, “Political Stability and Absence of Violence/Terrorism”, “Government Effectiveness”, “Regulatory Quality”, “Rule of Law” and “Control of Corruption”). The Indicators draw on a range of institutional, governmental, non-government and academic sources for components of data and these have recently begun to include monitoring of fiscal transparency.¹⁹⁶

Together with the range of international regulators or observers, led by the international financial institutions, these standards and codes create a web of meta-regulation (of states by states and non-state actors) at the international level that, together, ensure that governments are subjected more fully to the discipline of well informed markets. As illustrated in this paper, this range of international standards can infiltrate local policy making in a variety of ways, including country surveillance by IMF; creation of OECD database which is then used by academic researchers to rank country performance; incentives for developing countries to participate as a way of demonstrating good governance.

In particular countries, fiscal transparency norms may be embedded in a legislative framework – that is, take on a formal legal character – but they are more often built into procedural laws or codes to which governments will adhere because of political, rather than legal constraints. New Zealand, Australia and the UK, have chosen not to legislate a hard target or rule but instead to apply transparency requirements, in particular with a medium term expenditure framework, to impose fiscal discipline. Many of these are not legislated, although they all

¹⁹⁵ Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, “Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007 “ (Policy Research Working Paper No WPS4654, World Bank, 2008).

¹⁹⁶ For example, one data source for the Governance Indicators is the Institutional Profiles Database, a project of the French Government examining 85 developed and developing countries, which commenced in 2006 and which includes an examination of transparency of fiscal and tax policy, tax evasion, regulatory quality: *ibid*, Table A21. The Indicators also draw on the International Budget Project Open Budget Index (since 2005), Table A25.

legislate reporting, auditing and institutional independence requirements. Many developing countries have attempted to combine hard legal restrictions for deficits with a range of legal and non-legal transparency obligations. Some, like India, provide a much more diverse set of reports and information than is required in their legal system, largely in response to legislator concerns and an active and vocal civil society and NGO sector.

As the transparency codes are primarily about government credibility as regards economic policy, they may have the effect of binding future governments: “in practice it is also the case that given that the UK now has a code in place it might be very difficult for a future government to remove or substantially loosen the code without significant loss to its economic credibility”.¹⁹⁷ A future government may, perhaps, only succeed in removing the code in a time of crisis when emergency measures of control might be called for (it is not yet clear whether the current financial crisis, in which governments may be required to spend unprecedented public funds on supporting the banking system and credit markets, would qualify as an “out” to allow governments to legitimately operate with significant fiscal deficits, or alternatively, to raise taxes.

Is a universal set of transparency norms desirable or useful? Are policies designed in one context are simply being transplanted elsewhere without adequate attention to local visions of development or would local development or experimentation – or grassroots action – be better? Mike Stevens reminds us that it is important to look at the history of budgeting laws and processes in a country in analysing and seeking to “modernise” the budgeting frameworks of many developing countries along the lines proposed by the IMF and OECD.¹⁹⁸ Local context is also emphasised by Rodrik, who argues that institutions are central to development but the most successful institutions tend to be local and embedded, where development has been successful it has been in the context of local institutional change.¹⁹⁹

We have identified in this paper that purely procedural approaches

¹⁹⁷ Emmerson, Frayne and Love, above n 10, 39

¹⁹⁸ Stevens, above n 9.

¹⁹⁹ Rodrik, above n 97, *.

to transparency tend to call for comprehensive and timely disclosure of “relevant” fiscal information, so that *outsiders* can assess the “performance” or “effectiveness” of government. Thus, budget transparency may only or primarily ensure accountability of a government to lenders and donors. A different sort of information and analysis may be called for to ensure “effectiveness” of government performance, or accountability, in a particular country or to local constituencies. Formalisation itself may be of benefit more to outsiders than to locals, as David Kennedy has observed, discussing the politics implicit in the apparently neutral goal of formalisation of systems for allocating property rights or credit.²⁰⁰

“In a particular developing society, for example, it might be that the existing – discretionary, political, informal – system for allocating licences or credit is entirely predictable and reliable for some local players even where it is not done in accordance with published rules. At the same time it might not be transparent to or reliable for foreign investors.”

Similarly, discretionary or un-formalised taxing or spending powers may operate predictably for some people – most likely locals – but not for external investors. There is, of course, a danger of relativism here – discretionary powers are very likely to be applied for the benefit of only some and not all local players in a way that discriminates against the less powerful and less well resourced in the economy, such as a rural underclass, urban factory workers at the mercy of footloose industries, or women. Nonetheless, it is important, as Kennedy observes, to acknowledge the politics embedded in apparently neutral standards and procedural norms, from the beginning and upfront. Our goal is to do this but also then to seek to empower and deepen that politics with a democratic focus.

More generally, how might the transfer of budget transparency norms across borders challenge national control over economic policy? Fiscal policies are classically the domain of national governments, a core element of the sovereign state. However, in particular (but not only) for

²⁰⁰ Kennedy, above n 6, 22.

developing countries, tax and spending policies are increasingly formulated at a global level, utilising expertise in international and regional institutions. In the era of globalisation, the “fiscal compact” must be understood as traversing national boundaries. It concerns both the relationship between a national government (or other levels of government) and citizens in that country, and the relationship of those citizens and that government with other countries and with organisations in the international sphere. In this broad sense, the “fiscal compact” encompasses all elements of a government budget, including taxes, spending, aid and debt, and the necessary political and institutional arrangements necessary to sustain equitable development through the budget.

Recently, various commentators have begun to envisage what genuine global governance might look like. Dani Rodrik puts forward an idealistic vision of global federalism in his book *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (2007). Tax lawyers and policy makers have envisaged various means of collecting and distributing tax revenues at the global level either through establishment of an international tax organisation that would enable significantly enhanced cooperation and sharing between countries, or even through establishment of an international tax.²⁰¹ As outlined above, there has also been a significant increase in cooperation regarding the delivery of aid and implementation of lending – on one level, this is the “transfer” element of a nascent global tax-transfer system.

What are the uses of fiscal transparency and governance norms in an era of globalisation of fiscal policy? We suggest that fiscal frameworks may perform a function of linking national governments (and their citizens) with each other and with international institutions. This could indeed comprise a first step in meta-regulation of a global fiscal federation. The establishment of global legal norms concerning budget transparency is an important first step. It combines with a move in many sectors, but pushed primarily by NGOs, towards establishing increased accountability generally for international agencies, in particular the international financial institutions, in respect of their policy prescriptions

²⁰¹ Tanzi, Jinyan Li, Avi-Yonah

and funding choices.²⁰² We have witnessed the growth of transparency at the international level, led by the IMF following significant pressure from social movements who demanded greater transparency in IMF procedures, policies and formulation of macroeconomic programmes. Publication of country documents and organisational reports is now standard and there is a mass of information available to country governments, academics and citizens. There is a continuing and wide-ranging debate about reform of the governance structure of the IMF and other agencies and the IMF and other organisations are, increasingly, directly engaging with civil society as well as governments.²⁰³ This engagement is aimed on one level at improving processes and outcomes of these agency activities. A fairly widespread consultation took place in respect of the revision of the IMF *Code for Fiscal Transparency* 2007. On another level, it is aimed at increasing legitimacy of the IFIs themselves in the face of public opposition to organisational policies. However, this involves agencies such as the IMF, as Ben Thirkell-White explains, in a process which is inevitably political and sits uneasily with its current technocratic function of managing global stability.²⁰⁴

The significant developments in recent years concerning transparency of budgets is likely to enhance the fiscal compact at a national level. In addition, these processes lead to increased accountability of national governments which are recipients of IFI loans or aid, to external lenders and donors. However, while external accountability is important for international lending and aid processes, it is less successful at incorporating domestic political and social perspectives. We argue that national budgets remain the centrepiece for establishment of a sustainable fiscal compact for development. New developments in international aid as budget support have brought a global dimension to the fiscal compact through engagement of international agencies and donor countries with

²⁰² Michael N. Barnett and Martha Finnemore, *Rules for the World : International Organizations in Global Politics* (2004); Robert O'Brien et al (eds), *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (2000), 183.

²⁰³ International Monetary Fund, *Guide for Staff Relations with Civil Society Organizations* (2003) <<http://www.imf.org/external/np/cso/eng/2003/101003.htm>> at 22 September 2008.

²⁰⁴ Ben Thirkell-White, "The International Monetary Fund and Civil Society" (2004) 9(2) *New Political Economy* 251.

recipient governments in budget policy making. This is promising in that the budget process provides a space for the distributive and other consequences of taxing and spending to be contested. A question is whether the budget process can handle so many different policy goals and stakeholders in an effective manner.

In conclusion, we find that fiscal transparency norms have been developed through a complex interaction of international and domestic processes, public and private actors, and softer and harder legal forms. While there is an obvious pattern of norm transfer from international agencies to the domestic level, the reverse has also occurred. Certain developed countries have been especially influential in defining what constitutes best practice and this points to a concern about the implications of simply transplanting these norms around the world without adequate attention to local priorities and stages of development. Further, the distinction between soft and hard law is often blurry in this area. Informal norms may have *de facto* enforcement mechanisms to do with market credibility and access to loans, giving them some characteristics of hard law for developing countries. Conversely, domestic fiscal transparency legislation takes the form of hard law but its power may be primarily symbolic and contingent on the strength of domestic institutions, making it not dissimilar to soft law.

The emergence of common standards of fiscal transparency has the potential to contribute to global coordination of both tax and spending policies. However this paper calls for a careful balancing of these goals with the need to promote a meaningful and inclusive fiscal politics at the domestic level. Budgeting is primarily an activity of nation states, and any particular fiscal bargain between growth- and equity-promoting policies needs domestic support in order to gain traction. International tax policy literature has been largely preoccupied with the problem of how to increase multilateral coordination in a manner that is consistent with international equity. Our study draws attention to the equal importance of domestic budget processes and institutions in generating the political support needed for fiscal reforms, including any new forms of transnational cooperation.

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A. HEADING 2

1. HEADING 3

Niklas Luhmann concludes his major treatise, *Law as a Social System*, on a very skeptical note, noting that what he described as the legal system. There

