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Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries with Specific Focus on Zimbabwe

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Abstract: Base erosion and profit shifting activities of multinational enterprises (MNEs) have been a hot issue globally. Topical among the strategies employed by MNEs has been the issue of transfer pricing (TP). Developing countries are argued to be significantly affected by TP manipulation resulting in substantial tax revenues being lost. As a response to curb the unfavourable impacts of transfer mispricing, most developing countries have adopted the OECD TP guidelines and enacted TP legislation to regulate TP activities. The arm's length principle is the core of TP legislation, yet it has brought challenges for tax administrators and their auditors in enforcing and assessing compliance respectively leading to disputes. In view of the ever-changing business world and continuous efforts by MNEs to minimise their tax obligations through income shifting, it was imperative to assess the factors affecting the effectiveness of TP audits and dispute resolutions as measures to enhance compliance and enforcement in developing countries, with specific reference to Zimbabwe. Findings include the lack of clarity in TP legislation, resource constraints and complexity of transactions, lack of expertise as well as the shortage of comparable data. Developing countries are encouraged to formulate clear TP regulations and invest in the capacitation of revenue authorities.

Keywords: transfer pricing, audit, dispute resolution, comparable data, effectiveness

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1 Introduction

Multinational Enterprises play a fundamental role in the global economy at large and developing countries in particular. They contribute to economic growth, employment creation, poverty reduction and tax revenues to fund government expenditure (Blumenthal & Ratombo, 2017). Numerous researchers have also raised concern about the negative impact of MNEs' operations on domestic revenue mobilisation. They specifically allude to the fact that despite contributing a substantial share to global profits, they are involved in significant activities that lead to Base Erosion and Profit shifting (Biondi, 2017; Cooper & Nguyen, 2020; Silberstein, 2009). MNEs artificially move profits from high tax jurisdictions to low tax jurisdictions and tax havens in order to minimise tax liability or wholly avoid paying tax in certain jurisdictions using highly complicated and opaque schemes. For instance, manipulative transfer pricing occurs through mispricing of both goods and services, corporate assets as well as tangible and intangible assets, debt shifting, interest payments, royalties and management fees as well as treaty shopping (Davies, Martin, Parenti, & Toubal, 2018; Tørsløv, Wier, & Zucman, 2020). Tax avoidance by MNEs poses a huge challenge to policy makers, tax authorities and international bodies such as the OECD, UN and ATAF among others (Barrios & d'Andria, 2020; Kabala & Ndulo, 2018). Researchers such as Azemar (2019) and Kobbi-Fakhfakh (2021) have submitted evidence in support of the argument that MNEs methodically pay less corporate tax as compared to similar domestic enterprises. The contribution of MNEs to economic development and their unfavourable impact on tax revenue mobilisation has led to a conundrum of how states can enact policies that enable maximum tax revenue collections from these corporations while remaining attractive to foreign direct investment (Muthitacharoen, 2020; Shongwe, 2019).

Empirical evidence and arguments by researchers have been persuasive on the erosion of the tax base and expansive tax avoidance by MNEs through manipulative practises (Johannesen, Tørsløv, & Wier, 2020; Muthitacharoen & Samphantharak, 2020). Transfer pricing (TP) is considered as one of the most widely used Base Erosion and Profit Shifting (BEPS) avenues that have been exploited to the detriment of corporate tax revenue mobilisation in developing countries (OECD, 2013; Sebele-Mpofu, Mashiri & Schwartz, 2021; Wier, 2020). Transfer pricing is defined as the price at which goods and services are sold or exchanged

between intra-group firms and their affiliates (Beebejaun, 2019; Bhat, 2009). Transfer pricing is not in itself bad or illegal, but, since it occurs among related parties, the challenge is when it becomes aggressive, unethical and manipulative (transfer mispricing) (Beebejaun, 2019; Bhat, 2009; Klassen, Lisowsky, & Mescall, 2017). The transfer price applied by MNEs has a bearing on the profits reported by MNEs and their affiliates in the various countries they operate in and ultimately the taxes they pay. This is because the price is reflected in their financial statements or books of accounts, constituting the backbone of their calculation of profits and taxable income (the intra-group exchanges can be accounted for as income or expenses depending on who sold to whom). In arranging their affairs in such a manner that they maximise their profits and wealth for their shareholder, MNEs take into account the most effective and cost-reduction methods such as tax minimisation or tax avoidance (Cooper & Nguyen, 2020). Developing countries are the hardest hit by these decisions as they depend largely on tax revenues (Bhat, 2009; Jaffer, 2019; Mashiri, 2018). The OECD (2014) and Shongwe (2019) table that the low-income countries' over-reliance on corporate tax is under threat from MNEs' tax avoidance tendencies. MNEs constitute a consequential component of the tax base in developing economies. MNEs make up approximately 70% of Rwanda's tax base and an estimated 88% of Nigeria's tax base and more than 20% of Burundi's total tax revenues (OECD, 2014). Due to increased TP manipulation and its impact on tax base erosion including distortions of taxing rights, the OECD and UN came up with TP legislation guidelines to curb and regulate TP and these have been adopted by some developing countries and are at different implementation levels (Mashiri, 2018; Tørsløv et al., 2020). These prescribe the application of the arm's length principles in pricing decisions of transfers (Cooper, Fox, Loeprick, & Mohindra, 2017; Kabala & Ndulo, 2018), though other alternative methods such as unitary and apportionment formulary have been advocated for (Avi-Yonah, 2015). It is against this background that the importance of having effective transfer audit units that can help assess and identify TP risks, assess compliance with TP regulations, audit TP transactions productively and provide support for effective dispute resolution as well as sufficient and appropriate audit evidence in the case of litigation cannot be overemphasised. This study makes an intellectual and practical contribution to the literature on TP especially on enforcement of the TP regulation as well as on the cogency of audits and dispute resolution mechanisms, which is an understudied area (Shongwe, 2019).

Several studies have sought to explore BEPS activities in developing countries (Barrogard et al., 2018; Cobham & Janský, 2019; Janský & Palanský, 2019; Oguttu, 2016, 2017). Contemporary research has currently centred on the enactment and effectiveness of TP legislation in developing countries as well as the suitability or applicability of OECD and UN transfer pricing regulations to developing countries

(Beebeejaun, 2018, 2019; Florence, 2016; Kabala & Ndulo, 2018; Mashiri, 2018). Few studies have been conducted on TP audits and effective dispute resolution as tools that can be used to minimise TP abuse (Shongwe, 2019). This is despite the fact that how to regulate TP, counteract the TP activities and strategies, reduce the magnitude of transfer mispricing, and improve domestic revenue generation remain topical subjects in development agendas and revenue mobilisation discussions of developing nations (Blouin & Robinson, 2020; Johannesen et al., 2020; Wier, 2020).

For several years, Zimbabwe had in place anti-avoidance provisions in terms of Section 98 of the Income Tax Act, Chapter 23:06 (1996). This section granted the Commissioner General of Taxes the authority to disregard any pricing of transactions which was deemed to be mainly tax avoidance motivated and to invoke the market price on such transactions. Section 98 (anti-avoidance provisions) was amended in 2014, due to concerns raised by the Ministry of Finance that it provided inadequate guidance on reporting procedures (Mashiri, 2018; National Budget Statement, 2016). The amended provisions covered transactions that occurred between associated companies and income splitting, thus splitting Section 98 into Sections 98A and 98B to regulate income splitting and anti-avoidance respectively. In January 2016, Zimbabwe put into place specific transfer pricing legislation, introducing the 35th Schedule, which implemented the arms' length principle in pursuance of the OECD guidelines that the country adopted (Hudzerema, 2016). This study contributes to the body of knowledge on BEPS in developing countries by evaluating the effectiveness of TP audits and dispute resolution mechanism in developing countries and the factors affecting their efficacy, with a specific focus on Zimbabwe. Effective TP regulation enforcement and monitoring mechanisms coupled with strong audits and dispute resolution processes is essential for effective domestic revenue mobilisation and curbing of illicit financial flows. The challenges identified and recommendations of this study are envisaged to be well applicable beyond Zimbabwe, as the problem of BEPS through TP manipulation is a reality for most developing countries. This study thus, makes a contribution to policy and practise on how to improve TP regulation enforcement, through amelioration of audits and dispute resolution processes.

2 Literature Review

There is a tight connection between the level of economic development of a nation and its propensity to mobilise tax revenues to fund government expenditure (Wier, 2020). The broadening of the tax base in developing countries is impeded by the insufficiency of resources and capacities for effective revenue mobilisation as well

as the presence of a huge informal sector (Sebele-Mpofu, 2020a). The narrow tax base of developing nations is under threat from the BEPS activities of MNEs, as these corporations move profits and ultimately potential tax revenues from high tax jurisdiction to low tax jurisdictions (Cobham & Janský, 2019; Johannesen et al., 2020; Mashiri, 2018; McNair, Dottey, & Cobham, 2010). The BEPS risks have been pinpointed in the BEPS Actions 2 (neutralising the effects of hybrid mismatch arrangements) and 4 (limitations on interest deductions in order to limit base erosion through the exploitation of the interest expense) of the OECD guidelines (Barrogard et al., 2018). Developing countries are argued to be disproportionately affected by profit shifting hence compromising their ability to attain their Sustainable Development Goals (SDGs). In response to the global challenge of BEPS caused by MNEs through TP abuse, the UN and OECD drafted guidelines to be used by countries in their entirety or in part and even through customisation to their contextual needs to control and regulate TP activities. Despite the adoption of these TP regulations in developing countries, TP manipulation is still a major challenge due to the weaknesses in implementation and fragile administration capacity to confront and bring to account the often “well advised and experienced MNEs” (Wier, 2020: 1). The deterrence model (rational economic actor model) holds that taxpayers are rational economic actors, who engage in a cost and benefit analysis when it comes to paying tax. The taxpayer weighs the benefits of complying against the costs of non-compliance and if the benefits outweigh the cost, the taxpayer evades tax (Allingham & Sandmo, 1972). In short, if the deterring factors (penalties, risks such as reputational and financial, probability of being audited) were low, the taxpayer would evade tax (Sebele-Mpofu, 2021). In the same context firms, violate the arm’s length principle that is the cornerstone of TP guidelines and regulation if audits are less frequent, absent or ineffective. Wier (2020) points to the irregularity of TP audits in developing countries and further raises the concern that even when MNEs TP are audited the audits are not effective, perhaps due to the uncertainty in TP regulations and the methods of establishing the arm’s length prices. The uncertainty and subjectivity in the arm’s length principle open crevices for MNEs to engineer persuasive arms’ length price benchmarks that put them in advantageous positions that continue to disadvantage tax revenue mobilisation. It is against this background that this research concentrates on factors influencing audits and effective dispute resolution as measures to help mitigate abusive TP in developing countries. Being a literature review section, this section focused on the definition of key terms and then lays a foundation for the research by exploring literature on the hindrances of effective TP audits and disputes resolution in developing countries.

2.1 Transfer Pricing Audits and Dispute Resolution

Blouin & Robinson (2020) emphasise that discussions on how to mitigate the scope and effect of BEPS transactions by MNEs are a hot topic in developing countries. Successful audits of MNEs transactions especially those involving TP as well as effective dispute resolution are essential to enable productive efforts to regulate TP transactions and curb tax avoidance. Auditing is defined as an example of an assurance engagement (Jackson & Stent, 2012; South African Institute of Chartered Accountants [SAICA], 2012). An assurance engagement is an engagement in which a practitioner expresses a conclusion on the outcome of an evaluation of a subject matter against suitable criteria to gather sufficient and appropriate evidence to back up the conclusion (Jackson & Stent, 2012). In this case, the MNEs intra-firm transactions become the subject matter which is measured against suitable criteria (TP legislation especially the arm's length principle) in order to draw a conclusion for the intended users (revenue authority or government). Accordingly, for criteria to be considered suitable, it must exhibit characteristics such as neutrality, consistency, relevance, understandability and availability. This enables auditors to gather sufficient and appropriate audit evidence upon which the conclusions are drawn (SAICA, 2012). This reliable, adequate and relevant evidence forms the basis of dispute resolution, either out of court or in court. It, therefore, becomes evident that clear, well-crafted, documented and effective TP legislation becomes the foundation of effective TP audits and dispute resolutions as suitable criteria against which compliance is evaluated. Unlike a general tax audit and financial statements audit, the audit of MNEs would focus less on tracing the accounting computations to accounting records. An audit of MNEs centres on understanding the business arrangement, transfer pricing risk, gaining a comprehensive understanding of the benchmarks employed for TP as well as comparability analyses, the accounting treatment of transactions, the valuation of assets, the transfers made and the potential for BEPS surrounding transactions (Shongwe, 2019). Successful TP audits and dispute resolutions could enrich future compliance (Liu, 2014), incidentally improving future tax revenue mobilisation as well as strengthening the protection of the tax base or broadening it. The process can also boost the current tax collections, especially in instances where adjustments have to be instituted, ultimately resulting in the recovery of tax that had been lost through unfair TP practises or charges that are in breach of the arm's length principle (UN, 2017).

Dharmapala (2017) defines tax avoidance as the reduction of tax obligations within the confines of the law “while maintaining the same substantive economic outcome. When tax avoidance becomes aggressive and unethical, it thus becomes

harmful to economies. A substantial number of researchers table that MNEs in particular and conglomerates in general often digress from the arms' length pricing when it comes to a related party or intra-group transactions like in the exchange of intangibles, services and goods (Becker, Johannesen, & Riedel, 2020; Beer, De Mooij, & Liu, 2020; Davies & Markusen, 2020; Mashiri, 2018). It becomes imperative that TP audits of tax avoidance behaviour of MNEs be carried out to measure the intra-firm transactions against similar arms' length transactions. Bakke, Hopland, and Møen (2019) submit that stricter enforcement of TP regulation and increased TP audits leads to a reduction in profit shifting behaviour. Similar findings were tabled by Florence (2016) and Nguyen, Tham, Khatibi, and Azam (2019). While studying the extent, evolution and effectiveness of TP legislation in 26 European countries, Lohse & Riedel (2013) conclude that the effective application of TP regulations and audits can consequentially decrease income shifting and actually curtail the profit shifting behaviour by approximately 50% on average. TP rules violation penalties also go a long way reducing in income shifting activities (Lohse & Riedel, 2013; Shongwe, 2019). Marques and Pinho (2016) while focussing on a sample of European foreign affiliates also drew analogous conclusions. The authors conclude that where TP regulations are strictly applied and related parties tightly scrutinised MNEs were discouraged from moving profits to lower tax jurisdictions and tax havens. Cooper, Fox, Loeprick, and Mohindra (2017) adduce that effective implementation of TP regulations is advantageous in a number of ways. They help fight against tax evasion; minimise the impact of illicit flows as increased scrutiny of transactions could dissuade those abusing TP to minimise such activities due to fear of detection, audit and penalties and bring clarity and certainty on how related party transactions are regulated and dealt with for tax purposes. Effective TP rules further bring equity in the treatment of both local and foreign investors, hence showing stability and consistency in the investment climate. Finally, the TP regulations help to preserve and protect the competitiveness of local industries from TP (Cooper et al., 2017; Mashiri, 2018). Despite the importance of TP audits and effective dispute resolution being underscored by a number of researchers, these activities face several hurdles, especially in developing countries.

2.2 Factors Affecting the Effectiveness of TP Audits and Dispute Resolution

The UN (2017) manual outlines that auditing TP transactions and/or resolving disputes that concern them calls for considerable adaptability and strength due to the intricacy, volume and uncertainty inherent in TP investigations. The

complexities surrounding TP activities make TP audits complicated and expensive for both the revenue authorities and taxpayers (Kabala & Ndulo, 2018; Mashiri, 2018; Wier, 2020). The factors affecting the success of TP audits and dispute resolution efficacy vary in relation to the contextual environment as well as the level of development and application of TP among developing countries. Asongu (2016) groups developing countries in three stages based on the level of adoption of TP regulations: those that have not adopted TP regulation, those that have partially adopted and those that have fully adopted. From the available literature, several issues that affect TP audits and dispute resolution could be deduced and these include the complexity of MNEs' transactions, TP legislative clarity, the flexibility and subjectivity of TP arms' length pricing methods, resource limitations and lack of comparable transactions among other factors. These factors seem to be interconnected with one having a bearing on the other. For example, the complexity of TP transactions signifies the need for comprehensive and well-developed audit skills and expertise to unpack any irregularities or to effectively appraise transactions for compliance with TP legislation. On the other hand, the uncertainty, flexibility and subjectivity compound the complexity of MNEs' transactions heightening audit challenges and controversies in the TP dispute resolution process. The factors are explored below.

2.2.1 Complexity of MNEs Ownership Structures, Transactions and Arrangements

Shongwe (2019) submits that the audit of MNEs is not an easy task, but an arduous one that requires careful consideration of how the business is structured. The researcher further explains that this calls for the appreciation of "the commercial and economic reality of business operations such as the generation of incomes, profits and which functions of the business are essential to generating the profits" (Shongwe, 2019: 3). The fact that MNEs are highly diversified and span across wide geographical areas, continents and various countries lead to them having complicated control structures (Bhat, 2009). The complexity increases as they continually build up by adding more layers of associated and related companies. These complex ownership arrangements give auditors problems when seeking to establish the origins of transactions and the relatedness between transacting parties, especially where there are issues of indirect control involved (Blouin, Krull, & Robinson, 2019). Economics and tax literature refers to the intricacy of such structures as easily exploited for cross border tax planning and avoidance. For example, an MNE can design the product in Botswana, Manufacture it in Zimbabwe, test it in South Africa, hold patents in China and assign marketing and selling rights to a subsidiary in Malaysia or any other country in a tax haven

jurisdiction. The intricacy of ownership structures leads to misconceptions and weaknesses in endeavours to make corporates sustainable, accountable, transparent and responsible. Through a web of formally independent legal entities, MNEs have opportunistically avoided regulations including TP and tax legislation (Biondi, 2020).

Meier and Smith (2020) point out to the use of mergers and acquisitions across borders being a novel route for MNEs tax avoidance. The scholars estimate annual tax avoidance due to tax haven mergers and acquisitions at US\$29.7 billion and non-tax mergers and acquisitions to rob the global economy of a further US\$34.1 billion in annual tax avoidance. The researchers further explain that the tax haven mergers, which were the focus of their paper, take place in two ways: asset building mergers and acquisitions and haven purchases. The former being the case where the acquiring firm is located in a tax haven and the motive to acquire other firms is to increase its asset base in a low tax jurisdiction, thus exposing it to lower tax rates. The location (tax residence) of the parent is important for tax purposes. Having a tax haven parent makes it uncomplicated to shift profits since tax has no controlled foreign entities to prevent profit shifting. In the case of double taxation, due to jurisdictional tax rules, the income in tax havens would be exposed to lower tax rates (Meier & Smith, 2020). Haven purchases occur when the target company is in a tax haven. This can be done to build a presence in the tax haven, thus allowing for strategies such as profit shifting and manipulative TP. Relocating the firm's tax residence to a tax haven can be another way (Karkinsky & Riedel, 2012; Meier & Smith, 2020).

Knotty and impenetrable control structures enrich tax planning for MNEs, as they generally make it difficult and at times impossible for revenue authority officers and auditors to follow company assets and liabilities or even to trace the conduits going through various jurisdictions for interest payments, dividends, royalties or others forms of profit repatriations (Reurink & Garcia-Bernardo, 2020; Torres Preciado, 2019). The global nature of MNEs presents them with opportunities for the creation of global channels for corporate tax avoidance that are embedded in their operations. Ni Chasaide (2020) states that the opaqueness of MNEs transactions, strategies and channels used for TP and their implications are not easy to pinpoint or unpack, hence these present auditors with formidable channels when trying to follow the audit trail of these transactions. Dharmapala (2020) affirms this concern and alludes to the use of tax havens (where information is not easy to get from the relevant authorities), intellectual property and intangibles (ambiguous nature of such transactions as well as the ease of transferring them with no accompanying production) including other activities involving financial transactions. It is also often difficult to measure fees such as

management and technical fees and royalties of intangibles as there are often no comparable transactions in the market (Tørsløv et al., 2020).

MNEs through their complex control arrangements shape and re-shape the legal-economic structure of their transactions in a manner that allows them to achieve the desired outcomes such as tax avoidance (Avi-Yonah, 2017). Jones, Temouri, and Cobham (2018) affirm the complicatedness of MNEs structures and transactions as impediments to effective TP audits. Jones et al. (2018) further table that the complexity of TP activities and tax planning aggressiveness of MNEs is compounded by the assistance and services they get from the big accountancy firms. The researchers further state that MNEs who are clients of the big accountancy firms have intricate subsidiary arrangements when viewed in terms of depth and entropy making it easy to hide, obscure and shift wealth from the wealth creation location to a more tax favourable environment. This robs countries where the wealth was made, of their rightful tax revenues, through the “legal and financial disaggregation of activities within corporations” (Jones, Temouri, & Cobham, 2018: 3). Sikka and Willmott (2010) describe tax consultants as more of financial engineers who consider tax as a cost that can be avoided as opposed to it being an indispensable contribution to government funding and indirectly to society for health, security, education, including social investment vital for the society.

2.2.2 Subjectivity of the Arm’s Length Principle and Flexibility of Methods

The OECD has focused on providing and modifying the TP guidelines in order to respond appropriately to BEPS activities of MNEs. The imperfect alignment or incompatibility in some instances of these TP guidelines and evolving international and national tax laws have heightened the complexity and misinterpretation of these guidelines, adding to contradictory TP assessments, adjustments and taxation of these transactions as well the uncertainty in the application of the TP regulations. The conflicting assessment surrounds the application of the arm’s length principle and how to measure value creation in a transaction among related parties (Büttner & Thiemann, 2017). TP regulations have made international tax regulations and national tax regulations more complicated and at times ineffective in ensuring equitable taxation. The insistence on the application of the arm’s length principle in some cases has provided MNEs with opportunities to structure their transactions in more sophisticated ways increasing the reductions in tax payment (tax avoidance) and even heightening non-taxation of incomes for some affiliates in certain tax jurisdictions (Biondi, 2017).

As posited by the UN (2017) the determination of arms’ length price “is not an exact science”. The decision is subjective, since it is a matter of judgement

influenced by knowledge, skill and experience. The proposal of TP guidelines by the OECD and their subsequent adoption by many countries was a step towards regulating manipulation of transfer pricing as well its distortionary impact on the allocation of taxing rights and unfavourable effect on revenue mobilisation. The UN and OECD prescribe the use of the arms' length prices for intra-firm transactions to make them comparable to market transactions between a willing buyer and willing seller basis. The guidelines prescribe five methods to arrive at this unbiased price and these are the comparable uncontrolled price (CUP), cost plus method (CPM), the resale price method (RPM), transactional net margin (TNM) and the transactional profit split (Choi, Ishikawa, & Okoshi, 2020; Choi et al., 2020). These methods come with their subjectivity aspects and the fact that there is flexibility in the choice leaves room for manipulation (the individual appraisal of the methods for the benefits and challenges is not explored in detail in this paper). MNEs often go to great lengths to justify one method or the other as long as it gives them the tax advantage (Wier, 2020). To argue for TP violation or the need for an adjustment, tax authorities and auditors must provide proof of the misapplication of arm's length principle, give evidence of specific transactions whose price would have deviated from the price charged by the MNEs if the arms' length principle was upheld (that is between unrelated parties). Owing to the difficulties in supplying comparable information, auditors often fail to stand their ground and at times tax authorities can lose court cases or where they have won the cases, appeals can be successful and court resolutions overturned (Tørsløv et al., 2020).

Contradictory rulings in almost similar cases give an insight into the challenges faced by auditors when it comes to the burden of proof. Despite the responsibility of preparing TP documentation resting with the taxpayer, auditors have to re-compute, assess and successfully dispute the taxpayers' submissions and computations where there are deviations from the arm's length principle and provide reasonable grounds for doing so. This no easy task for the auditor. For example, in the case of *Denmark versus Ice Machine Manufacturer, June 2020, National Court, Case No SKM200.224.VLR* the Danish court ruled in favour of tax administrators, entitling them to make a discretionary assessment of the taxable income. Thus, permitting them to benchmark the manufacturer (taxpayer) as opposed to the related party sales arguing that the taxpayer had failed to furnish it with robust information concerning the sales companies to enable reliable benchmarking (Beeton, 2021). Contrarily in the case of *Denmark versus ECCO A/S, October 2020, High Court, Case No SKM2020.397.VLP*, the Danish Western High court judged in favour of the taxpayer (ECCO Sko A/S). The court ruled that the TP documentation provided adequate justification for the benchmarks applied, thus preventing the tax administrators from applying the TNMM method to assess the income of a company making losses. In the case of *Netherlands versus Zinc Smelter*

B.V., March 2020, Court of Appeal, Case No ECLI: GHSE: 2020:968, the dispute was on whether the transfers that the company had made to its Swiss group entity in 2010 was at arm's length. The court ordered the use of the profit split method as opposed to benchmarking of the toll manufacturer (taxpayer), arguing that the related party and the taxpayer conducted joint activities. In *Nigeria-Prime Plasticchem* versus Federal Inland Revenue, Nigeria's Tax Appeal Tribunal allowed the revenue administrators to replace the taxpayer's CUP method with the TNM method because the comparable transaction used was a related party one, which was deemed an unreliable benchmark and not arms' length (Beeton, 2021). The tribunal argued that the additional assessments were appropriate in terms of the Nigerian TP legislation and OECD guidelines. In a similar case, involving the *Coca-Cola Company*, the US tax court permitted the tax authorities to benchmark in accordance with the comparable profits method (CPM), anchoring on the argument that the intangibles in the group rendered both production and selling ordinarily routine activities (Beeton, 2021). The judge concluded that Coca-Cola was shifting profits through incorrect transfer prices applied to foreign subsidiaries in Brazil, Chile, Costa Rica, Ireland, Mexico and Swaziland, hence leading to an additional US\$3 billion in tax liability for the group.

Providing a synopsis of fundamental themes that emerged from the 2020 TP cases and their resolutions that he analysed (For example, *Ice Manufacturer, ECCO, A Oy, Kellog, Zinc Smelter, Addecco* and *Toyota* among others), Beeton (2021) brings to light five important premises that became evident in the 2020 cases, including;

- i. The prominence of TP activities on goods and intangibles in the extractive and manufacturing sectors as opposed to financial transactions.
- ii. The importance of providing detailed functional appraisals and fully supported benchmarks.
- iii. An opposition or refusal by the court to the re-categorisation of transactions in respect of the arm's length principle violation except in instances where the arrangements it is obviously not commercially justifiable or it was apparent that tax avoidance was the sole motivation.
- iv. The flexibility in the application of TP guidelines and methods of determining arm's length prices.
- v. A consideration of what is feasible within the limitations of TP agreements, hence the need for the legal analysis of the agreements (Beeton, 2021).

These cases are evidence that the flexibility of TP methods as well as the burden to prove the tax avoidance of the economic substance of transactions impacts on audits and dispute resolutions, the challenges are even greater for developing countries where comparable data is scarce. The Covid-19 pandemic has worsened

the situation due to company closures, reduced production, shrinking markets and consumer purchasing power.

2.2.3 Underdevelopment of TP Legislation in Most Developing Countries

As highlighted in Section 2.1, auditing is dependent on the availability of suitable, consistent, clear and understandable criteria. Equally, the productive accomplishment of TP audit depends of the quality and clarity of TP legislation in a country. According to Guj et al. (2017) and the UNCTAD (2020), most African countries lack appropriate TP legislative frameworks. The categorisation of developing countries by Asongu (2016), in relation to the level of adoption of TP regulation as those that have not adopted, those that have partially adopted and those that have fully adopted on its own, points to challenges for auditors. For those in the first stage, there is no suitable criteria, benchmarks or guidelines against which to evaluate TP transactions. For those in the second stage, the partial adoption is an indication of the underdevelopment of regulations. The question could be, what influenced the partial adoption, is it a matter of contextualisation, risk management and optimum resource allocation (focussing on the areas that are most prone to the risk of TP manipulation). According to Mashiri (2018) and Kabala and Ndulo (2018), even in countries where the OECD TP guidelines were wholly adopted, challenges of lack of legislative clarity, inconsistent application of the legislation, cumbersome and unclear documentation requirements and lack of comprehensive TP databases, as well as the reliance on external databases, negate the effective application of the regulation. This puts auditors in an awkward position as it becomes problematic to gauge compliance with TP legislation. In affirmation, Shongwe (2019: 2) adduces that “the availability of legislative standards poses unique opportunity to face off with aggressive taxpayers, leading to an aggressive audit process” and the lack of TP legislative clarity weakens the position of revenue authorities when it comes to TP audit and dispute resolution process. This was illustrated in the Unilever Kenya Ltd Case, where efforts by the Kenyan Revenue Authority was challenging the prices for transactions between Unilever Kenya Ltd and Unilever Uganda (both subsidiaries of Unilever United Kingdom) on the basis that they were not arm’s length based on the Kenyan Income Tax Act (Section 18 (3)). Kenya’s judge ruled in favour of Unilever UK (appellant), highlighting that Section 18 (3) that the Kenyan Revenue Authority founded their case on was an inadequate guide to the taxpayer and hence unreliable to enforce TP rules. The judge argued that in the absence of clear TP rules, the OECD guidelines applied by the taxpayer sufficed as guidance for arms’ length computations (Mashiri, 2018; Murphy, 2012).

In a contradictory landmark ruling in Malawi in 2016, the court ruled that the application of OECD regulations deviated from the domestic TP regulation in place, hence illegal. The judge ruled, “Where local legislation provides for the law, it is always imperative to apply the law and international instruments can be used to interpret the law” (UNCTAD, 2020: 114). The tax administrators should “strictly follow the dictates of the law enacted by the legislature and any slight departure from the law is not allowed”. In the same vein, the absence of clear and effective regulation and requisite audit skills can result in a confrontational strategy to the audit for both the taxpayer and revenue administrators. The battle drawn approach can resultantly fail to achieve any meaningful mutual engagement for the two parties. Sebele-Mpofu (2020a) alludes to the negative impact of the fractured relational social contract between the state (revenue authorities) and its citizens in most developing countries negatively affecting tax morale.

2.2.4 Lack of Comparable Data

The lack of comparable information or prices brings uncertainty and lack of clarity certain transactions are priced, thus affecting both the taxpayer and tax auditors (Cooper et al., 2017). Where comparable information is non-existent or where an uncontrolled price is available but has to be adjusted to make it comparable, the process may be complex, arbitrary and subjective impeding the success and effectiveness of audits (Jaffer, 2019). Biondi (2017) points to the fact revenue authorities often find it difficult to establish an arm’s length price and often resort to constructing it. The enforcement process becomes cumbersome, time-consuming and complex for both taxpayers and revenue authorities.

Audits of intra-firm transactions involving intellectual property and other intangibles are as well as enforcement of TP legislation is ineffective due to the limited applicability of the arms’ principle as at times market values cannot be observed or are not available because the property or intangible might be peculiar to that one company (Holzmann, 2017). The Covid-19 pandemic has worsened the lack of comparable information problem. The pandemic brings forward peculiar economic settings where comparable data is unavailable publicly due to company closures, reduced operating capacities, lost markets as well low consumer disposable resulting in companies selling at depressed prices. Barrogard, Calderón, de Goede, Gutierrez, and Verhelel (2018) call for political will and commitment by developing country governments to set aside funds for capacitation with subscriptions to relevant databases.

2.2.5 Inadequacies in TP Knowledge, Experience and Exposure Among Revenue Administrators and Auditors

Kabala and Ndulo (2018) allude to the fact that the understanding of TP legislation is rudimentary among tax officers and auditors in developing countries. Reiterating the TP knowledge deficiency in developing countries among the administrators and enforcers of TP legislation, Mashiri (2018) established that the TP auditors faced lack of skills and limited capacity challenges. The researcher explained that most developing countries used the general tax auditors for auditing TP transactions, yet the lack of technical expertise, skills, exposure and experience crippled their effectiveness. A number of researchers studying BEPS and transfer pricing in developing countries (Barrogard et al., 2018; Kabala & Ndulo, 2018; McNair et al., 2010; Nakayama, 2012) affirmed these shortcomings. According to Mashiri (2018) this lack of skilled personnel problem is closely connected to the challenge of shortage of financial resources. Developing countries lack enough financial means to employ, train, develop and keep competent, experienced and qualified TP auditors (UN, 2017).

MNEs on the other hand use the services of skilled tax consultants as well as their technical skilled and well-resourced tax departments (Barrogard et al., 2018; Mashiri, Dzomira, & Dzingirai, 2021). Ajdacic, Heemskerk, and Garcia-Bernardo (2020) describe the role of tax consultants in facilitating the shifting of profits by MNEs as the “Wealth defence industry”. The researchers allude to the fact that these consultants help minimise the tax that wealthy individuals and corporations pay. The consultants are exposed to continuous professional development, experienced and technically well-exposed. These often have the financial resources to follow legislative changes and use the expert knowledge to construct legitimate accounting and financial schemes to exploit legislation by situating assets and liabilities as well as income and expenses in certain jurisdictions (Ajdacic, Heemskerk, & Garcia-Bernardo, 2020). Reiterating the challenge that the advisory capacity role that tax consultants play to MNEs have on the effectiveness of TP audits, Holtzman and Naget (2014) submit that the consultants help in TP planning and implementation, compliance and documentation drafting, monitoring and lodging the TP returns with the tax authorities and other additional support services. These could be offering guidance, support in negotiations and arbitration or legal support in court cases. Affirming the upper hand that MNEs tend to have over TP auditors Sikka and Willmott (2013) and Jones et al. (2018) portend that accounting firms such as Deloitte, Ernest and Young, Price Water House Coopers, and KPMG are multi-jurisdictional and cross-disciplinary. This gives them the advantages of spanning across jurisdiction, hence insights into the tax laws of various countries and those of skills diversity respectively. The firms

tend to have accountants, tax experts, lawyers and legal advisors, computer and financial analysts as well portfolio managers under one roof. This allows them the advantage of tax minimisation “innovation”. TP auditors tend to be less equipped to confront the well-advised MNEs as most revenue authorities lack the same diversity that MNEs are privileged to have (Mashiri et al., 2021). In most instances, developing countries do not have specific TP units implying that they use general tax auditors for TP audits. Kabala and Ndulo (2018) define a general auditor in tax administration as one who is “tasked with overseeing all taxes such as valued added tax (VAT), pay as you earn (PAYE), corporate income tax (CIT)”.

2.2.6 Infrequency of Audits and Lack of Resources

The diversity of MNEs, the geographical size of MNEs, the scope of TP legislation, the magnitude and intricacy of TP transactions, the expansiveness of the tax base all have an implication on the resources required to carry out an effective TP audit. UN (2017) emphasises that TP audits tend to be both resource (financial, technical and human) and time-intensive. Dispute resolutions of TP cases are prone to delays and sometimes the cases are lengthy (Kabala & Ndulo, 2018; Mashiri, 2018, Shongwe, 2019). Developing countries ordinarily have limited resources to conduct effective TP audits. Inadequacies in resource refer to lack of TP skills and expertise among revenue officers as well as tax auditors, human resources (shortage of enough human capital in revenue authorities to create separate TP units), technical and financial resources (Asongu, 2016; Mashiri, 2018; Oguttu, 2016). Due to the time and resource-intensiveness of TP audits, they tend to be less frequent in developing countries (Shongwe, 2019). UN (2017) recommends that developing countries need to increase the frequency of TP audits and strengthen TP audit sections by creating TP administration units that focus on administering the TP issues and audits and equip them accordingly. TP audits require technical and sophisticated skills and substantial resources as outlined by the United Nations Economic Commission for Africa (UNECA), (2018), yet African nations are deficient in this regard. The unit could be enhanced by including economists, lawyers, accountants, various industry experts such as geologists, finance specialist and computer-assisted audit specialists among others (Kabala & Ndulo, 2018; Kwaramba, Mahonye, & Mandishara, 2016; Mashiri, 2018).

While developing countries tend to suffer from scarcity of financial resources as well as TP skills shortages, MNEs on the other hand have a bountiful of resources. The flexibility in resource allocation enables MNEs to acquire the services of tax consultants from well-established accounting firms to advise them in drafting their TP strategies to minimise tax or shift profits, assist them in crafting their TP documentation as well as in preparing for TP audits. These tax consultants

also provide support for dispute resolution and during court cases (Jones et al., 2018).

2.2.7 Information Asymmetry and Lack of Cooperation from MNEs and Counterparts Nations

Effective audits depend greatly on information-sharing, transparency, data collection as well as a strengthened tax administration (UNECA, 2018). There is generally information asymmetry between the developed and developing countries, with the status quo privileging developed countries at the expense of their developing countries counterparts. Some developed countries leverage on both their financial and political muscles when it comes to TP enforcement capacities and capabilities, yet developing countries tend to find it difficult to get the necessary information required by tax authorities, tax auditors and the courts, weakening the productiveness of audits and dispute resolution processes (Kabala & Ndulo, 2018; McNair et al., 2010). Oguttu (2016) reiterates that the information asymmetry and disproportionate power advantages taxpayers, revenue authorities, tax consultants, tax lawyers and auditors in developed countries give them more ammunition and room for aggressiveness in tax avoidance strategies and dispute resolutions, to the disadvantage of the less privileged developing countries' tax administrators, auditors and courts. The OECD (2012) points out that MNEs are generally not forthcoming and very "economical" when requested to share information by tax authorities and auditors. They sometimes deliberately share large volumes of information in order to confuse auditors. This impedes the audit and dispute resolution process. The information-sharing challenges are further compounded by the ineffectiveness of double taxation agreements and APAs in compelling parties to the agreements to share information and to cooperate with revenue authorities and auditors of their counterparts during audits and dispute resolutions (Jaffer, 2019). The use of tax havens in TP transactions heighten the challenge of information asymmetry as these havens often refuse to cooperate with their party tax authorities and their auditors. The havens conceal information on behalf of their clients or deliberately take long to avail the information or provide one that is incomplete (OECD, 2012).

2.2.8 Poor Case Selection for Both Audits and Litigation

According to Shongwe (2019: 3), "Auditing MNEs often involves a broad range of complex technical issues". In light of the limited resources characterising developing countries, it is fundamental that the right cases are selected for both audit and dispute resolution litigation. UN (2017) asserts that developing countries often

suffer from the problems of poor case selection for both audit and judicial resolution and this often results in both audits and litigation being ineffective. The mismatch between the time and financial resources dedicated to a case and the magnitude as well as importance of the case can negatively influence the effectiveness of audits. Shongwe (2019) and the UN (2017) emphasise the importance of case selection so that the dedication of time and resources can be done appropriately to ensure that the allocation is optimal, efficient and effective. A cost and benefit analysis is essential when selecting cases for audit. Affirming the importance of good case selection that is guided by risk identification, the OECD (2012) underscores the need for commercial understanding in risk analysis, evaluation and case selection. Features that may be indicative of TP risk include consequential related party transaction in low tax jurisdictions and tax havens, transfer of intangibles to affiliates, business restructurings, mergers and acquisitions, continued loss-making and poor performance, consequential variations in effective tax rates, inadequate or non-existent TP documentation and evidence of computations among others. The OECD (2012) further submits that because developing countries' revenue authorities strive to maximise yields in light of their meagre resources, a well-structured and systematic case selection process is vital. Three methods have been used by countries to select cases. Firstly, the application of sophisticated methods to pinpoint relevant cases as higher risk using computer systems for assessing appropriate data about the business. Secondly, the selection of cases for TP audit and enquiry yearly is an issue of routine regardless of whether the risk has been identified or not. Thirdly, choosing a case for TP audit and enquiry whenever that business' gross value of cross border transactions surpasses a set threshold (OECD, 2012). Poor risk appraisal can lead to anticipation of legal issues early in the audit, raising legal arguments too early in the case, premature deployment of specialists, experts and other resources as well as unfocused economic analysis.

2.2.9 Tax or Fiscal Court Ineffectiveness

Mashiri (2018) contends that developing countries' local tax courts tend to take longer periods in resolving TP cases, maybe due to a lack of knowledge and expertise among court officials and judges, considering the adoption of TP legislation is still in its infancy. In agreement, Shongwe (2019) points out that the governance process is neither effective nor robust enough in developing countries to enable TP cases to be speedily and appropriately resolved. The researcher further contends that effective dispute resolution is linked to the availability of the right skills in the courts, strong and clear TP legislation and access to information as well as strong capacity for tax administration and audits. Despite the

importance of these factors being underscored, researchers continue to highlight most African countries tend to fall short in these key areas (Barrogard et al., 2018; Cooper et al., 2017; Kabala & Ndulo, 2018; Oguttu, 2016, 2017).

2.2.10 Absence and in Some Instances Effectiveness of MAPs, APAs, DTAs and Arbitration

Despite the presence of Mutual Agreement Procedures (MAPs) and Advance Pricing Agreements (APAs) and at times arbitration being considered possible ways of bringing clarity and predictability in investments and TP regulation, their effectiveness is still controversial and contested (Sundaram, 2012). Shongwe (2019) points to these agreements being probable ways to minimise lengthy and resource-intensive legal battles. APAs are agreements made by the taxpayers and the revenue authority or authorities on the right TP for some agreed future transactions. Some countries in Europe have made use of these extant pricing agreements with MNEs to securitise the tax revenue collection and solve the potential of tax dispute in advance (Avi-Yonah, 2017). Mashiri (2018) portends that most developing countries do not have these agreements in place. As highlighted by Sundaram (2012) and Beebeejaun (2019) that, far from providing clarity and predictability during arbitration based on these agreements, the arbitration process saddles the already resource-constrained developing countries with financial burdens. Sundaram (2012) further states that the arbitration process is complicated and costly (payments often in foreign currency for arbitrators, translators, facilitators and other parties involved in the process). Resource constraints for developing countries with limited financial resources impede the practicability of applying the arbitration process in the context of developing countries and may even unduly tilt the scales against them (Beebeejaun, 2019). The other challenge is the fact that due to the lack of appropriate and adequate expertise and experience of developing countries on TP issues, arbitrators could largely come from developed countries with limited understanding of the economic environments in developing countries, thus disadvantaging developing countries (Sundaram, 2012). In addition to the above concerns, Akunobela (2012) submits that some of these treaties are ineffective because they were entered into being driven by political motives with little attention given to BEPS. The researchers specifically point to Double Taxation Agreements (DTAs) and withholding taxes.

2.2.11 Institutional Corruption

Institutional corruption has been noted as a vital dimension in the discussion of constraints to the effectiveness of tax legislation enforcement and compliance

(Barrogard et al., 2018; Sebele-Mpofu, 2020a, 2020b; UNCTAD, 2020). Kirchler, Hoelzl, and Wahl (2008) alludes to a negative correlation between institutional corruption and tax compliance. Mashiri and Sebele-Mpofu (2015) explain that corruption perpetuates illicit trade, constraining revenue mobilisation and undermining the socioeconomic stability of nations. Customs officials were alleged to be aiding customs duty evasion robbing governments of potential revenues and lowering the tax morale of compliant traders. UNCTAD (2020) points out corruption to be a key factor in driving illicit financial flows in the African continent. Mashiri (2018) affirms the role of corruption in tax evasion and avoidance by MNEs in Zimbabwe. The researcher points out that corruption among revenue officers is a big challenge as some revenue officers are secret advisors and informants to MNEs and their consultants.

2.3 Theoretical and Conceptual Framework

The rationality theory by Weber (1968) and Brunsson (1982) informs this research. It entails that the rational decisions are taken by a rational actor such as the revenue authority, government, tax auditors and the courts, elicit equally rational responses by taxpayers (MNEs in this case), thus contributing to the challenges affecting the effectiveness of audits and dispute resolution. The revenue authority, as a rational economic actor, through various activities such as TP regulation, audits and dispute resolution would want to collect maximum revenue possible for the government and minimise tax avoidance and BEPS of MNEs. Audits by tax authorities general act as a deterrent to unethical tax avoidance, manipulative TP and tax evasion. This can only be possible if these audits and penalties are perceived as effective by taxpayers and in this case MNEs otherwise according to the rational economic actor or deterrence model any perceived ineffectiveness would lead to increased non-compliance or violation of TP regulations in the case of this study as outlined in the model by Allingham and Sandmo (1972). A conceptual framework reflecting the authors' understanding of the various concepts of literature and their relationship to this study through the interaction of variables is schematically presented in Figure 1.

3 Methodology

This research followed the interpretivist research philosophy. Ontologically this paradigm views reality as multiple and being a product of interactions between various participants and epistemologically the choice of paradigm was influenced

Figure 1: Conceptual framework.
Source: Own compilation.

by the fact that TP legislation was at its early stages of adoption in Zimbabwe (Kwaramba et al., 2016; Mashiri, 2018), therefore making research on the concept fairly new. Being an under-investigated research area, the interpretivist paradigm was considered appropriate to allow for deeper exploration of this novel area (Curry, Nembhard, & Bradley, 2009). Tracy (2013) considers TP to be a socioeconomic phenomenon driven by rational economic choices of actors such as MNEs, revenue authorities and the government (through the Ministries of Finance and that of Industry and Commerce). This study, whose focus being audit and dispute resolution entails that the effectiveness of these processes is influenced by the rational decisions of these actors. The study's target participants were therefore tax consultants, ministry of Finance Officials and ZIMRA officers that deal with TP administration and audits. The study was a problem focused-study as BEPS has a negative impact on developing economies. It was conducted with the objective to

suggest possible solutions that could ameliorate the effectiveness of audits and dispute resolution processes as well as the TP legislation adherence and tax compliance dilemmas. The qualitative approach was conducted using semi-structured in-depth interviews (see Appendix A), literature review and document review. In-depth interviews allowed for a deep investigation of issues and afforded the researchers the opportunity to dig deeper, seek clarification on ambiguous issues and ask follow up questions on issues that triggered their interest or appeared to be having contradictory views. Target population justification and selection of interviewees as well as the rationale behind the selection of interviewees is presented in summary in Table 1. Saturation achievement also informed the sample size, the more knowledgeable and experienced the participants on the subject matter the lower the number of participants required, since answers may be overlapping (Malterud, Siersma, & Guassora, 2016; Marshall, Cardon, Poddar, & Fontenot, 2013; Sebele-Mpofu, 2020b) (see interviewee profiles in Appendix B).

Auditing and dispute resolution involve human decision making and appraisal as well as application of legislative systems, thus document review of legislation and court cases was conducted to discern the factors affecting the efficacy of the two processes. Three court cases were purposively selected and reviewed. One of the cases was the first TP case published in Zimbabwe, CF (Pvt) Ltd versus ZIMRA FA 22/2014. It was important to include the landmark case as it normal set the setting for legal precedence. The other two cases, the Unilever case of Kenya (2005) and the SABMiller case study (SABMiller, 2014) were reviewed to discern a valuable understanding of the dispute resolutions concerns and the ability of audit evidence and TP legislation to fully support a case.

In fulfilment of the fundamental requirements of ethical research, the researchers sought informed consent from the participants; this was after they had explained the beneficence of the research and the fact that no possible maleficence was expected. This was in line with the prescriptions by methodology researchers such as (McKerchar, 2008; Ryan, Coughlan, & Cronin, 2007; Teddlie & Tashakkori, 2009), who encourage researchers to pay attention to ethical considerations, respect the privacy and confidentiality of participants and to ensure that participants fully understand their participation in the research.

For this study, participants were only interviewed after they gave their informed consent, signifying voluntary participation having fully understood the benefits of the research, its objectives as well as the fact that no likely negative repercussions were anticipated. The interviewees were recorded and later transferred to written form. All interviews were conducted between June 2019 and February 2020 face to face, before the Covid-19 pandemic. Each interview lasted for between 18 and 25 min. The researchers also transcribed some notes for key points

Table 1: Target population, sample size and justifications for inclusion and adequacy.

Participant group	Sampling method	Sample size	Justification of target population inclusion and sample size selection
Ministry of Finance	Purposive	5	The Ministry of Finance drafts tax policy in Zimbabwe including TP legislation, with advice from ZIMRA, tax consultants and legislators. It was a worthwhile participant in the study as a policymaker. A sample of five out of the eight members of the Revenue and Tax Policy department that were responsible for TP policy designing was considered sufficient as Creswell (2014) recommends a sample of between 3 and 10 participants for qualitative research.
ZIMRA Officers	Purposive	10	ZIMRA is the enforcer of TP regulations and the country's tax collector. It administers and enforces tax compliance through audits, penalties and taxpayer consultations. The officers were pivotal to the study especially their practical experiences and obstacles. The sample was drawn from the Department of Investigations and International affairs at ZIMRA. The participants were sampled because they had information on the audit of MNEs, their compliance with TP regulations as well as dispute resolution. A sample of 10 was considered adequate due to the information power and competence of participants (Malterud et al., 2016; Roy, Zvonkovic, Goldberg, Sharp, & LaRossa, 2015)
Tax Consultants	Purposive and snowballing	12	Tax consultants were considered vital to the study due to their involvement with both ZIMRA and MNEs. Tax is a sensitive matter and more so TP that is linked to high tax avoidance by MNEs, therefore MNEs were not keen to participate in the study, leading researchers to opt to use tax consultants. The first tax consultant participants were purposively identified through references. They gave deeper insights into the factors affecting the efficacy of audit and dispute resolution from their perspectives and experiences as advisors of both ZIMRA and MNEs.

Source: Authors' compilation.

and they compared these with each other during the analysis process. All participant information was kept confidential and during data analysis, participants were depicted using code names to make sure that they remain anonymous. TC for

tax consultants, ZIMRA for tax revenue officers and MINOF for Ministry of Finance Officials. Data gathered from interviews was analysed inductively using Atlas ti8 (a qualitative data analysis software [QADAS]) and themes derived. Deductive analysis was applied on document review especially on the review of legislation documentation and court cases in order to deduce the implications, the crux of the cases, the judgements and the significance of the case outcomes to audit and dispute resolution in the future. A combination of both primary and secondary data helped boost the validity of data, allowing for comparisons and confirmability advantages through triangulation of data sources (Denzin, 2012; Ryan et al., 2007).

4 Data Analysis and Presentation of Findings

The study found out that TP legislation was still in its early stages of application in Zimbabwe after the country adopted the OECD guidelines in 2016. Findings relating to the contextual setting and the administration of the TP regulations are discussed in Section 4.1. The research also established that there was an interdependence relationship between the effectiveness of the audits (quality of evidence and findings) as well as that of dispute resolution Section 4.2. Accordingly, most of the factors influenced the efficacy of both processes.

4.1 TP Legislation Adoption and Application in Zimbabwe

Participants expressed that TP regulations were a fairly new context in Zimbabwe and were fully enforced in 2016. According to interviewees TCs 1, 6, 7 and 10, TP legislation prescribes the application of the arm's length principle to pricing decisions in terms of Section 98B as read together with the 35th Schedule of the Income Tax Act, Chapter 23:06. Interviewee TC 5 explained, "*The application of the arm's length principle is such that transactions between related parties are priced just like any market transactions occurring between a willing buyer and willing seller basis. Zimbabwe adopted five methods prescribed by the OECD regulations. These are the resale price method, the cost-plus, transaction net margin, transaction profit split and the comparable uncontrolled transaction price methods*". ZIMRA officers concurred on the provisions of the Act and added that in addition to the Act, the Revenue Authority also designed ZIMRA transfer practise notes to help explicate this novel concept to taxpayers and give guidance on the application of the TP legislation. The notes were drafted in line with ATAF guidelines, the OECD TP guidelines, and the UN manual on TP. These documents provide guidance on MNEs and Tax Administrators on the TP. Interviewee MINOF three asseverated,

“Zimbabwe put in place TP legislation in order to ensure that the country curbs the effect of abusive TP tendencies by Multinational companies. Emanating from the various relationships that are found between companies that are subsidiaries, associates and affiliates, the general practice is for these companies to sell to one another normally at prices that are not consistent with those between independent parties transacting under comparable circumstances. The over or understating of prices for transactions between affiliates erode tax bases of countries like Zimbabwe”. ZIMRA 6 reiterated the importance of regulating TP transactions by pointing out that “the non-conformance to the arm’s length principle pricing in most case in Zimbabwe leads to the understatement of taxable income and indirectly the tax liability hence depriving the country of its rightful tax revenues for funding, development, health and education among other undesirable effects. After audits or where there are reasonable grounds to believe there has been a deviation from the principle, the commissioner raises an adjustment as well as interest and penalties in respect of the effected adjustment to the taxable income”.

According to interviewee ZIMRA 10, a thorough and in-depth analysis of the controlled intra-firm transactions and that of the contractual connections between the transacting parties is necessary, together with a comparison of the transaction with another independent transaction within similar conditions and economically appropriate circumstances. The ZIMRA TP practise notes (paragraph 7) (ZIMRA, 2017), outline the factors that are essential for consideration when establishing comparability. These include firstly, the properties of the asset, whether intangibles, goods or services are being transferred. Secondly, a functional analysis, taking into cognisance the assets used, the risks faced by parties to the controlled and uncontrolled exchanges, contractual terms governing the transaction. Lastly, the economic and market conditions in which the transactions occur as well as the business strategies followed by associated parties or related parties in pursuance of the transaction. It follows that therefore; the transfer pricing decisions should outline how these factors were taken care of depending on the TP method chosen out of the five possible methods. Accordingly, auditors take into assessment these factors too and their audit trail when checking for compliance. The review of literature revealed that taxpayers are expected to furnish ZIMRA with an Annual TP Return, which is part of the Income Tax Return when an Income Tax Return is submitted. Companies must do the Annual TP Return submission within seven days of being requested to do so by the Commissioner. Having been given the contextual context of TP regulation in Zimbabwe as well as the importance of enforcing it, TP audits were proffered as part of the enforcement process. ZIMRA 1 expressed that *“as part of the process to enforce adherence to the TP regulation we assess the TP documentation that is kept by MNEs as well as the TP return that they submit accompanying the income tax return. We evaluate these for compliance; look at the nature of the TP transactions and the magnitude of these transactions including the*

likely TP risks embedded in the transactions and relationships”. The ZIMRA officers highlighted that where there is a visibly high risk of likely TP manipulation, they follow up, either by engaging MNEs concerned on the matters to be resolved or by doing follow audits depending on a case-by-case scenario and the issue at hand. The outcomes of the deliberations and audits would then entail whether there is a need for an adjustment to the taxable income of the company and ultimately to the taxable and possibly to penalties and interests on the tax liability arising from the adjustment. ZIMRA alluded to the fact that the authority had since availed a new and comprehensive tax return in March 2020 that was drafted with assistance from ATAF, with the hope to improve compliance, enforcements audit and dispute resolution.

4.2 Challenges/Factors Affecting the Effectiveness of Audits and Dispute Resolution in Zimbabwe

The findings on the factors are presented in Table 2 below.

The factors that came out in data analysis include the ineffectiveness of the fiscal court, backlog of tax cases before the court, corruption, inadequate expertise

Table 2: Factors affecting the effectiveness of TP audits and Dispute resolution.

Factors affecting the effectiveness of TP audits and dispute resolution	% of participants alluding to the factor (number)			
	MINOF	TC	ZIMRA	TOTAL
Lack clear TP legislation	40% (2)	83% (10)	60% (6)	67% (18)
Subjectivity of arm’s length principle	60% (3)	92% (11)	100% (10)	89% (24)
Delays and weak capacity in the fiscal court	60% (3)	100% (12)	90% (9)	89% (24)
Insufficient skills, expertise and experience	80% (4)	100% (12)	70% (7)	85% (23)
Lack of comparable information	60% (3)	92% (11)	80% (8)	81% (22)
Fragile administrative capacity	80% (4)	83% (10)	70% (7)	78% (21)
Shortage of financial resources	100% (5)	92% (11)	100% (10)	96% (26)
Complexity of MNEs structures and transactions	80% (4)	75% (9)	100% (10)	85% (23)
Information asymmetry	60% (3)	83% (10)	100% (10)	85% (23)

Source: Authors’ compilation.

and experience in TP, lack of clear legislation, absence of databases for comparable information, the subjectivity of the arm's length principle and shortage of resources. These findings are presented in the form of frequencies (%) by interviewee categories as well as the total percentage based on the 27 interviewees. The figure portrays the percentage of participants who alluded to the particular factor affecting the effectiveness of the audit and dispute resolution processes. The number of participants pointing to the particular factor is also shown to enhance the interpretation of readers. Discussions of the views of these participants and direct quotations are used to enhance the explication of these findings. Pointing to the gap between legislation and its enforcement, Oguttu (2016), alludes to weak administrative capacity, the absence of international laws and weakly developed TP laws leading to abuse of treaties as the major reasons explaining the situation in developing counties.

4.2.1 Lack of Clear TP Legislation

This one of the biggest challenges denoted by many researchers on the effectiveness of enforcement of TP regulations (Beebeejaun, 2018; Kabala & Ndulo, 2018; Oguttu, 2016). This was also evident in this study as shown in Table 2. Eighty-three percent of TCs, 60% of ZIMRA and 40% of MINOFs pointed to the lack of clarity in legislation as a challenge to effective audits and dispute resolution. Ninety-two percent of TCs, 80% of ZIMRA and 60% of MINOFs concurred on the lack of comparable information as an important constraint. The challenges are even heavier for audits and dispute resolution because in order to assess compliance or build a case the standard measure or suitable criteria of evaluation must be clear. Both TCs and ZIMRA officers agreed on the challenges emanating from lack of clarity in regulations as well as the scarcity or absence of comparable databases to peg controlled transactions against as demanded by the Income Tax Act.

4.2.2 Lack of Comparable Information and Databases

All three groups concurred that the absence of comparable data brought subjectivity and abuse of TP legislation ZIMRA 2 specifically took researchers to paragraphs 10 and 11 of the ZIMRA TP practise notes (ZIMRA, 2017). The officer explained that these paragraphs prescribe that in the case where comparable information is scarce or non-existent, thus bring to doubt certainties concerning the reliability of comparables, how the arm's length pricing is evaluated will depend on a case-by-case consideration of the nature of the transaction or TP method used (paragraph 10) (ZIMRA, 2017). Paragraph 11 on the other hand focuses on where comparable data is unavailable in the same geographic markets as those

of the taxpayer, comparable information from other geographic markets can be used. The reliability of the comparable will be assessed on a case-by-case taking into account the effect of geographic variations and other distinguishing determinants such as price, market competition and profitability. It, therefore, follows that cases such as the one in paragraph 10 and 11 (ZIMRA, 2017), it is unavoidable that less than perfect data is applied, hence raising doubts on the consistence, reliability and neutrality of the evaluation yardstick. This makes it difficult for auditors to assess compliance effectively and the reasonableness of estimations of the arm's length price. The same challenges also arise on dispute resolution through negotiations, arbitration or court cases as pointed out by TC10. TC5 asseverated that the lack of comparable data problem and the consideration of other factors created room for exploitation of the discretionary nature of TP by both MNEs and tax authorities, thus provided with an opportunity for corruption.

4.2.3 Subjectivity of the Arm's Length Principle

In Table 2 all ZIMRA officers, 92% of TCs and 60% of MINOFs agreed on the fact that the subjective nature of the arm's length computations was a constraint to effective audits and dispute resolution. Participants submitted that the arm's length principle is subjective and that tax administrators and tax auditors often find it difficult to enforce compliance and to evaluate compliance respectively. Interviewee TC4 explained, *"In theory, the principle appears to be simple and fairly straight forward but practical application is quite challenging especially for intangibles as these are mostly unique and difficult to establish their values due to complex arrangements such as setoffs and costs sharing in MNEs by their affiliates"*. Interviewee ZIMRA4 in acknowledgement also pointed out to the fact that though CUP is normally the best method, *"it is not always applicable due to the shortage of comparable data hence we end up considering other methods which are rather persuasive than objective"*. The officer further explained that the consideration of comparability issues such as the contractual conditions of the agreements, functions being operated, features of the property, goods or services, economic conditions and strategies, was on its own a subjective assessment. This subjectivity creates problems for both tax administrators and auditors. From the ZIMRA TP manual, the outline of what is considered made the subjectivity apparent, for example, strategies include risk appetite, the scope of diversification, and an assessment of political risk, innovation and development of new products. On the other hand, economic settings involve an assessment of the size of the market, consumer purchasing power, and geographic place of operation, demand and supply considerations among other factors. Just an appraisal of these two points out challenges of objectively establishing the price as well as following an audit trail for TP justification.

4.2.4 Delays and Weak Capacity of the Fiscal Court

Participants bemoaned the ineffectiveness of the fiscal court and pointed to this as an impediment too effective dispute resolution. ZIMRA officers pointed to the unavailability of dispute resolution procedures that are specific to TP and pointed out that the general procedures for dispute resolution for tax assessments are applied. Ninety percent of ZIMRA officers (all officers except interviewee ZIMRA 2) pointed out the fiscal court was not effective leading to many tax cases including TP remaining unresolved over long periods of time. All TCs expressed dissatisfaction over the delay in the finalisation of court cases and linked the delay to the understaffing of the fiscal court. They argued that the court had one judge dedicated to hearing the various tax cases including value-added tax, income tax as well as TP cases. Interviewees TCs 4 and 8 suggested that the judge is not fully equipped to deal with tax matters considering that tax issues are dynamic and ever-changing. This supposed weakness in the capacity of the fiscal court becomes a constraint when dealing with TP issues especially MNEs with highly knowledgeable and experienced tax departments that are backed by equally strong and well-versed tax consultants. These tax specialists are often no match for the less experienced tax officers and fiscal court officials as pointed out by a number of researchers (Ajdacic et al., 2020; Jones et al., 2018; Sikka & Willmott, 2013). The delays and lengthy periods taken to conclude TP cases are not only disadvantageous to taxpayers but also prejudicial to ZIMRA as it robs the authority of the opportunity to evaluate its legislation and success in the resolution of disputes (Mashiri, 2018). Monitoring and evaluation are essential for improvements in the legislative and operational arenas.

The ineffectiveness of courts and protracted courts cases is a common occurrence in developing countries. Interviewee TC4 highlighted the absence of APAs and weaknesses in double taxation agreements as compounding the challenges faced by the courts in resolving TP cases in developing countries. Interviewee TC6 submitted that there is also a paucity in resolved TP cases to lean on as legal precedence because TP is a fairly novel area of implementation in developing countries. The fiscal court is viewed as the essential authority responsible for resolving cases and contributing to the drafting of tax legislation through setting legal precedence that courts and taxpayers can refer to in future, “so justice delayed is justice denied”. This reduces tax morale and waters down legal progress in tax matters as well as negatively affects TP legislation and tax administration.

4.2.5 Insufficient Skills, Expertise, TP Knowledge and Experience

Adequate skills, expertise, experience and knowledge are key ingredients for tax administration to be effective and more so for audits and dispute resolutions, yet most developing countries are founding lacking in these fundamental aspects. All

the TCs concurred that the lack of appropriate expertise and skills, as well as experience amongst TP auditors, revenue officers in general and tax officials, crippled the effectiveness of audits and dispute resolution. The majority of TCs were of the opinion that they had an upper hand in TP matters when compared to tax administrators and auditors due to their exposure, experience and continuous professional development. Most of them were registered with institutes in South Africa, the United Kingdom and Europe to improve their knowledge and specialisation in TP. The study revealed that ZIMRA was not actively pursuing TP audits, perhaps due to the grey areas in TP legislation and lack of extensive expertise to unpack the complex MNEs transactions and ownership structures. Interviewee TC7 also attributed the delays in responses to issues raised by taxpayers on TP audits and disputes with ZIMRA by taxpayers to lack of adequate knowledge on TP legislation. In affirmation interviewees, TCs 5, 6 and 8 bemoaned the lack of expertise especially at it relates to the assessment TP transaction in the extractive sector. They explained the Revenue Officers and their investigations and audit departments are not fully equipped with appropriate and sufficient expertise to fully appraise and comprehend these mining issues with only accountants, finance persons and economists in their teams. The TCs further explained that MNEs exploit this skills and knowledge deficit to continuously report losses and maximise on tax avoidance. Similar views were raised in relations to developing countries (Barrogard et al., 2018; Nakayama, 2012), African counties (Kabala & Ndulo, 2018; Shongwe, 2019) and Zimbabwe in particular (Kwaramba et al., 2016; Mashiri, 2018). Eighty percent of MINOFs and 70% OF ZIMRA officers were in agreement regarding the negative impact of poor skills and expertise on audits and dispute resolution effectiveness and indicated that efforts were made to improve training, technical expertise and capacity building.

4.2.6 Fragile Administrative Capacity and Shortage of Financial Resources

Most developing countries and Zimbabwe included have weak administrative capacities and limited resources (Kabala & Ndulo, 2018; McNair et al., 2010), thus making auditing TP costly and engaging in lengthy resolution very difficult. Interviewee TC2 expressed that in Zimbabwe the problem is compounded by the scarcity of financial resources and lack of government commitment to allocating enough funds for the needs of tax administration. Interviewee ZIMRA9 reiterated the challenges of financial resources arguing that this led to poor remuneration ultimately resulting in a great deal of staff turnover as those with TP expertise move to MNEs and Accounting Firms. Interviewee ZIMRA8 re-affirmed this by saying *“highly skilled people leave ZIMRA for better opportunities in the private sector and unfortunately due to shortage of funds even outsourcing is very difficult”*. The

centralised nature of TP investigations and audits at the ZIMRA head office is also problematic and can be linked to weak capacity. It is important to have regional audit offices to increase the capacity and frequency of audits". The shortage of resources as well as the weak administrative capacity and lack of expertise are interconnected. TP audits require extensive resources, comprehensive skills, expertise and strong administrative capacity to unravel the complicated MNEs transactions and relationships that often disguised deeply in their activities yet Zimbabwe is found lacking. This was affirmed by interviewee TC6 who asserted, *"Financial resources are the key to everything, but in Zimbabwe lack of resources is our biggest weakness*". According to interviewee TC5 challenges of dispute resolutions and the protracted nature of audits were made worse by the nature of cases selected, the lack of preparedness on the part of ZIMRA perhaps due to lack of specialised technical expertise to guide in risk assessment and case selection for audits, arbitration and litigation.

4.2.7 Complexity of MNEs Structures and Transactions

Most MNE transactions are difficult to follow clear or do not have a clear audit trail making it difficult for auditors to assess them fully. This is worsened by the lack of cooperation among tax authorities and the general secrecy and uncooperativeness surrounding tax havens. Most developing countries do not have enough resources and expertise to audit these complex transactions and relationships (affiliates, associates, subsidiaries, permanent establishments, "invoicing companies" and others). This was affirmed by 100% of ZIMRA, 80% of MINOFs and 75% of TCs as presented in Table 2.

4.2.8 Information Asymmetry and Lack of Cooperation

Auditing is an information game, the lack of comparable data together with information asymmetry and lack of cooperation from third party tax authorities and those in tax havens make auditing difficult. It is difficult to verify ownership of assets and occurrence as well as the completeness of transactions. These are key aspects in auditing. Interviewee TC2 avowed that the two equally affect dispute resolution through arbitration and/or court cases. Interviewee ZIMRA3 pointed out that this is indeed a big problem because even where there are DTAs, these are ineffective. The officer further outlined that APAs are fairly new in Zimbabwe. The results on these two issues are also presented in Table 2. Interviewee ZIMRA9 argued that the lack of cooperation is not only on the international angle but on the domestic angle as well as MNEs are generally stingy with their information, they do not easily avail information on their transactions and at times give it in bits and

pieces making audits difficult. Interviewee TC6 on a different view on the uncooperativeness argued that the badly damaged relations between taxpayers and ZIMRA account for the situation. He expressed that “ZIMRA auditors tend to be aggressive, intimidating and somewhat accusatory causing MNEs and other taxpayers to be defensive and conceal some issues”.

4.2.9 Improved Role of the OECD in Relation to TP Regulation in Developing Countries

While acknowledging the crucial role occupied by the OECD in bringing stability, transparency and accountability in international taxation, Büttner and Thiemann (2017) observe that OECD guidelines continue to provide for bilateral tax treaties, detailed and complicated systems of TP and unilateral anti-avoidance measures. The findings from the research suggest that while the OECD plays an important role in developing countries, there is a need for it to play the role in a more inclusive manner by having these developing countries being part of the construction of these guidelines. The realities on the ground for most developing countries differ from the situation in developed countries. The realities of developing countries point to lack of comparable data, minimal financial resources, weak TP legislation, inadequate capacity, lack of knowledge and expertise, thus the application of OECD guidelines in their current form in these countries is a challenging task. This signifies the need for the OECD to work with bodies such as ATAF to provide TP guidelines that are customised to say developing countries (ATAF, 2019) that require more feasible and simplified TP methods that would strike a balance between the limited resources and weak political power available to developing countries' tax authorities in dealing with MNEs.

5 Recommendations

In light of the findings discussed in Section 4, this section makes recommendations that could possibly improve the effectiveness of audits and dispute resolution processes in developing countries. The researchers recognise that taxation is a political affair, that is surrounded by political disdain, therefore some of the recommendations might appear too politically and economically challenging to implement in the short to medium term but feasible in the long term with more political will and commitment from governments. Improving tax policy is a continuous balancing act with small steps over time.

5.1 Adopt, Update and Continuously Evaluate and Revamp TP Legislation

There is no doubt that the TP controversy is here to stay and its negative impact will be felt even heavily now that there is a heightened need for domestic revenue mobilisation due to the Covid-19 pandemic. There is an urgent need for funds to embark on programmes to deal with and mitigate the impact of the pandemic and survive lives, yet the importance of building enough investments to support economic revitalisation and avert economic collapse cannot be overemphasised. In light of this, it is essential that there are intensified audits and enforcement of TP legislation measures in order to curb BEPS activities. Developing countries are encouraged to adopt TP legislation and focus on their most vulnerable areas to TP manipulation and focus more on them as part of risk management. They should customise the OECD best practises to their economic settings. It is crucial that the emerging economies especially Zimbabwe continues to update their TP regulations to improve on legislative clarity and the required TP documentation. Kabala and Ndulo (2018), who highlight that most TP legislation in developing countries are neither fully developed nor updated to allow effective auditing and dispute resolution, as they are a weak measure and yardstick to build a case upon, support this recommendation. Shongwe (2019: 5) calls for the urgency to update these, review some of the narrow definitions of important terms such as a related party or “narrow wording on the treatment of commodity transactions”, that have given room to aggressiveness in TP by MNEs and made it difficult to argue cases successfully. Picciotto (2018) emphasises on the simplification and clarification of TP regulation in developing countries. Picciotto (2015) advocates for separate entity accounting as a measure that can reduce conflicts on TP matters and depoliticise the distribution of taxing rights.

5.2 Improve on Case Selection and Communication with the Taxpayer

Developing country audit departments to improve on case selection by conducting effective risk assessments to avoid missing consequential TP matters and unnecessarily protracted TP cases. The OECD (2012) reiterates the need for the identified risk assessments to be discussed with MNEs before significant resources can be committed to an in-depth audit, to give the enterprises the opportunity to shed more light on the assessed risks as the assessment could be based on incomplete information or a misapprehension of the commercial context of the particular transaction. The improved risk evaluation and communication is anticipated to lead to more targeted and cost-effective deployment of resources, shorter time for

audits and dispute resolution as well as maximisation of the yield from the processes. In Kenya, the Kenyan Revenue Authority is reportedly conducting aggressive risk-based TP audits, challenging TP arrangements for MNEs and their affiliates that have been reporting losses continuously and those whose transactions are largely with affiliates in tax havens. The audits are guided by upfront risk profiling before full audits are carried out (Deloitte, 2014; Price Waterhouse Coopers, 2015).

5.3 Strengthen TP Audit Section

There is need for developing countries and especially ZIMRA to strengthen the audit sections in general and TP audit sections in particular. This could be done by the inclusion of specialists such as accountants, economists, industry experts such as geologists, finance and computer specialists in order to have a balanced team with diverse skills. For example, Kwaramba, Mahonye, and Mandishara (2016) emphasised the need to have geologists in TP administration teams point out that in Zimbabwe TP mispricing is prevalent in the mining sector, as MNEs tend to exploit the lack of appreciation of minerals and other mineral products by ZIMRA officers. The OECD (2012: 57) states, “Transfer pricing work is a specialism in its own right and complex cases will often require input from tax experts and other specialist fields as well”. In view of this, developing countries could enhance the TP audit sections by developing a team of cadres with experts who have a comprehensive appreciation of key sectors of the economy such as the extractive sector, manufacturing industry and retail, among other sectors. These key specialist personnel could fundamentally help in the process of identifying TP and other tax risks that the industry is prone to. These could adequately address the concerns raised by interviews and the upper hand in tax avoidance skills enjoyed by MNEs pointed out by Biondi (2017). Tax avoidance by MNEs spans a big industry of advisors such as lawyers, economics and tax experts who advise MNEs on how to structure their transactions in ways that minimise or avoid tax (Biondi, 2017).

Bearing in mind the fact that most developing countries have no specific TP units and largely rely on general tax auditors, mixed teaming could be adopted, whereby the audit could be one audit, focussing on TP and general tax matters. In the same vein, an audit team with various experts such as engineers, accountant, lawyers and other specialists could be assembled, depending on the business being audited. This would allow flexibility in resource allocation, skills and knowledge (considering these are limited in developing country contexts). This could be a knowledge-sharing platform through amalgamating a diversity of skills together. Another way could be to pair the novice TP auditors with more senior, skilled and experienced auditors to boost knowledge-sharing (UN, 2017). The revenue authorities

can outsource the services of tax consultants, technical specialists and legal advisors in order to enhance the capacity and capabilities of the TP audit units of developing countries, but bearing in mind the likely conflict of interests that can arise with these outsourced specialists (OECD, 2012). These experts might have formidable experience and expertise to help raise rigorous and well-reasoned commercial arguments that are backed by legal precedence as well academic and practical theories. These experts can also significantly formulate forensic submissions in a focused and accurate manner, enhancing audit and dispute resolutions. The experts can do an outstanding job to the benefit of the tax authority in a quest to make a name for themselves. The key to attracting them is improved remuneration and working conditions, which are often a cause of disagreement in developing countries.

5.4 Embark on Comprehensive Capacity Building for Both the Revenue Authority, Their Auditors and the Fiscal Court Officials

Weak and fragile capacities of developing countries' revenue administration authorities are considered as the biggest impediment to effective TP regulating as well as productive audits and dispute resolution. In light of this, developing nations have to continue to make efforts to build adequate capacities through capacity building efforts. The most pivotal step is to dedicate sufficient financial resources to these revenue authorities to enable them to recruit, train and retain skilled personnel with appropriate skills, technical expertise and competencies. There is generally high staff turnover in developing nations' revenue authorities as their personnel moves to greener pastures as tax consultants or as part of tax departments of MNEs. Reiterating the importance of having sufficient financial resources, Fisher, Lerner, and Tidwell (2020) adduce that "for those important high dollar cases the IRS is well-resourced and determined and can be aggressive, procedurally and substantively. Its wealth of experience and organisational structure allows it to dedicate large multifaceted teams to handle transfer pricing audits and litigation". TP has both political and economic implications, therefore the need for political will and commitment is pivotal to the deployment of adequate resources to the revenue authorities. Barrogard et al. (2018) posit, "There is normally a disconnection between commitments of the country at a policy level, implementation through a country's tax strategy plan or communication to tax administrators". Other efforts to build capacity could be through staff exchanges with other countries, secondment of key personnel to countries with well-established TP units to understudy, bring the tapped knowledge and skill back home and share with other employees. Personnel could be seconded to an organisation such as the World Bank, OECD, International Monetary Fund (IMF) and African Tax Administration Forum (ATAF) to gain more insights, training, exposure and experience on TP administration, regulation and audits

best practises. Revenue authorities can also high TP experts and auditors from developed countries for a short period of time to help train their own personnel, improve their competencies and understanding of TP issues and challenges before they can let them go after their agreed term expires.

5.5 Intensive Training and Setting up Fully Equipped Training Centres for Tax Administrators and Their Auditors

In order to ensure continuous training that is attached to technological advancements and keeping with the best practises in TP regulation, audits and dispute resolution, developing countries can set up training units for tax issues nationally or regionally or even continentally. This could be done through the bodies such as ATAF and have these units fully equipped technologically and with the requisite human capital to conduct the training on TP matters and other tax matters. There is a need to enhance training facilities to improve the database, the TP systems as well as information in developing countries as these are viewed as not comprehensive or focused enough. UNECA (2018) avows that in Africa, training needs to be focused on African issues as in most cases where personnel is sent for training or seconded to learn in developed countries where technological development are advance and capacity, the training tends to be out of grip with the realities of the African continent. Organisations such as Tax inspectors without Borders can assist in training and technical capacity development in these training institutes.

5.6 Enhance the Operations of the Fiscal Courts

There is a need to improve the capacities of the fiscal court with legal expertise in TP pricing as well as judges that hear tax cases. The courts could perhaps recruit tax experts to assist the judge with tax disputes. For example have someone experienced and well-exposed on TP issues assist the judge in dealing with TP disputes.

5.7 Consider Other Ways of Dispute Resolution Before Litigation

Litigation tends to take forever in resolving disputes. ZIMRA is encouraged to consider other alternatives avenues as preferred options before taking the cases to court. The OECD (2012) encourages revenue authorities to minimise the scope of the dispute and seek engagement and dialogue and minimise confrontation, do a

cost and benefit analysis to assess whether the likely revenues that can flow from the case make it worth pursuing. In a case where the likelihood of winning the case is high, litigate but where the scope is limited, compromise and in weak or less beneficial case concede as opposed to pursuing. Aderndorff (2019) in relation to the South African Revenue Authority while pointing out protracted legal battles expressed similar views, expensive litigation processes and unrecovered legal costs in most tax cases. One could argue that the recommendation presupposes a cordial relationship between the MNEs and tax authority, which is not the case. The recommendation encourages the building of a synergistic relationship. In any case, an antagonistic relationship between taxpayers (MNEs) and tax authorities breeds conflict and creates a hostile tax environment that reduces cooperation, trust as well as tax morale and ultimately leads to non-compliance and costly enforcement (Kirchler et al., 2008; Kirchler, Kogler, & Muehlbacher, 2014; Sebele-Mpofu, 2020a, 2020b). The challenge with arbitration is that the resolution of conflicts, the processes and procedures undertaken remain privy to participants only (Biondi, 2017), hence leaving no future legal precedence.

6 Conclusions, Limitations and Areas of Further Research

The main objective of the research to get an understanding of the factors affecting the efficacy of TP audits and dispute resolution in developing countries. It was evident that the two processes were not effective enough to foster compliance and productively deter manipulative TP tendencies and BEPS. The effectiveness was marred by factors such as the complicated nature of TP concepts and how they are applied, the shadowy nature of some of the concepts such as arm's length principle, the lack of comparable data and costs of accessing such data, limited financial resources, deficiency in staff capacity, skills expertise and specialisation in TP. In addition, factors such as weak technological infrastructure, lack of legislative clarity, the opaqueness of MNEs transactions and the resource-intensive nature and the lengthy time frame of TP audits and disputes were other obstacles as well as the novel nature of the concept. The research concluded that because transfer pricing regulation enactment is still in its early stages in developing countries, revenue authorities often grapple with the OECD guidelines and UN guidelines that these countries have adopted. They have not yet fully conceived these, they generally do not possess the required expertise and have no financial resources to support effective audit and dispute resolution processes. Though the literature review focused on developing countries, the empirical part of the

research focused on Zimbabwe only. The findings and conclusions drawn may have an element of subjectivity, considering that Zimbabwe adopted the specific TP legislation only recently (2016). The findings could have been influenced by the tax system that regulated transaction between related enterprises (Section 98 of the ITA, Chapter 23:06), described in Section 1. The delay that ordinarily exists between the enactment of new legislation and its enforcement by the regulators (government, revenue authorities and fiscal courts) might have contributed to the constraints pointed out by the study participants. Future research could explore the topic after a considerable time from now. Despite Zimbabwe being a developing country, the country has been faced with economic downturn and other political issues that can make its conditions worse than other developing countries. Future researchers can focus on other developing countries to give an average picture. Having applied only a qualitative approach to data collection and analysis in the study, future researchers are encouraged to apply a mixed method approach or the quantitative method. Lastly, it came to be known during the research that in 2020 Zimbabwe introduced a new and more comprehensive return as guided by the ATAF, future research could assess whether this new return has made the information requirements clearer, enhanced compliance and improved the administration of TP regulation.

Appendix A: Interview Guide

A. TP legislation adoption and application in Zimbabwe

1. Zimbabwe has recently introduced new transfer pricing rules, outline the TP regulatory system in Zimbabwe and how you have applied it.
2. How feasible has been the enforcement process of the TP legislation? What challenges have you encountered?
3. What are the dispute resolution procedures in the case of a transfer pricing adjustment in Zimbabwe?
4. How effective are these dispute resolution procedures?

B. Challenges affecting the effectiveness of TP audits and dispute resolution

1. How often do you conduct TP audits?
2. How effective are the TP audits?
3. What challenges are encountered in the auditing of TP transactions and in resolving disputes while applying the TP rules?
4. ZIMRA plays a vital role in the detection and oversight of transfer pricing abuse. How effective is ZIMRA in discharging its duties in relation to transfer pricing?

Appendix B: Interviewee Profiles

Acronyms used for coding participants during data analysis and for presentation in Table B1 (summary of Interviewee profiles).

TC	Tax Consultants
MINOF	Ministry of Finance Officials
ZIMRA	Zimbabwe Revenue Authority Officers

Table B1: Summary of Interviewee profiles

Name	Affiliation	Position	Experience
TC1	Accounting Firm	Tax Manager	10 years (former ZIMRA).
TC2	Accounting Firm	Tax specialist	Eight years in international tax
TC3	Accounting Firm	Transfer Pricing Manager (Zimbabwean based in South Africa)	Two years
TC4	Tax Consultancy	Founding Managing Director	18 years as senior tax consultant Also holds <i>Advanced Diploma in Transfer Pricing</i> and <i>Advanced Diploma in International Tax</i>
TC5	Accounting Firm	Tax specialist (Now with an Accounting firm in Botswana)	Five years (was previously chief investigations officer of ZIMRA for 16 years)
TC6	Accounting Firm	Tax Partner	More than 20 years (former ZIMRA officer)
TC7	Accounting Firm	Tax & Transfer Pricing Associate	Three years
TC8	Accounting Firm	Tax Partner	Three years
TC9	Accounting Firm	Senior Partner	12 years
TC10	Tax Consultancy	Senior Consultant: Global Transfer pricing	Four years
TC11	Accounting firm	Tax Specialist	Nine years(former ZIMRA)
TC12	Tax Consltancy	Managing Director	28 years (22 years with ZIMRA)
ZIMRA1	Department of Investigations and international Affairs	Investigation officer	Seven years
ZIMRA2	Department of Investigations and international Affairs	Investigation officer	Six years
ZIMRA3	Department of Investigations and international Affairs	Investigation officer	Five years

Table B1: (continued)

Name	Affiliation	Position	Experience
ZIMRA4	Department of Investigations and international Affairs	Investigation officer	Eight years
ZIMRA5	Department of Investigations and international Affairs	Investigation officer	12 years
ZIMRA6	Department of Investigations and international Affairs	Investigation officer	Three years
ZIMRA7	Department of Investigations and international Affairs	Investigation officer	Two years
ZIMRA8	Department of Investigations and international Affairs	Investigation officer	Two years
ZIMRA9	Department of Investigations and international Affairs	Investigation officer	Four years
ZIMRA10	Department of Investigations and international Affairs	Investigation officer	Six years
MINOF1	MOF, Revenue and Tax Policy Department	Revenue Specialist	Nine years
MINOF2	MOF, Revenue and Tax Policy Department	Tax policy Specialist	Eight years
MINOF3	MOF, Revenue and Tax Policy Department	Tax policy Specialist	11 years
MINOF4	MOF, Revenue and Tax Policy Department	Tax policy Specialist	Four years
MINOF5	MOF, Revenue and Tax Policy Department	Revenue Specialist	13 years

NB* All the Tax Consultants were Zimbabweans, two of them currently working for tax departments in Accounting firms outside Zimbabwe (Botswana and South Africa). Four of the Tax consultants have had a chance to be attached to South African Revenue Services and one with the Kenyan Revenue Services to learn more on transfer pricing.

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