Regulating Multinational Enterprises (MNEs) transactions to minimise tax avoidance through transfer pricing: Case of Zimbabwe

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DECLARATION

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I, Eukeria Mashiri, declare that: Regulating Multinational Enterprises (MNEs) Transactions to Minimise Tax Avoidance through Transfer Pricing: A Case of Zimbabwe is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that I submitted the thesis/dissertation to originality checking software and that it falls within the accepted requirements for originality. I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signed: Date: 12/11/2018

DEDICATION

The research is dedicated to my two children, Mufaro and Emily; I pulled this through because of you.

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Above all, I give glory to the Most High God!

ABSTRACT

In 2016, Zimbabwe introduced specific transfer pricing legislation to prevent abusive tax strategies by taxpayers. This study uses a qualitative interpretive inquiry to assess the adequacy of the new transfer pricing regime. This study contributes to the body of knowledge in that it explores transfer pricing as a tax avoidance tool, a concept that is at its nascent stage in academic taxation literature. Furthermore, it addresses a methodological gap by employing a qualitative inquiry in an area that is predominated by quantitative research. Indepth interviews and document review were used to gather data, and deductive content analysis was employed with the aid of ATLAS.ti 8™. This study confirms previous findings that tax consultants play a significant role in the compliance decisions of Multinational Enterprises (MNEs) through the examination of the exploitative strategies practiced by these MNEs. The comparison of the OECD and UN transfer pricing guidelines in search for the applicability of international guidelines to Zimbabwe's specific needs helped uncover the contemporary dilemmas in global standards versus domestic standards. This study responds to the knowledge gap regarding the transfer pricing phenomenon in Zimbabwe through the lenses of an under-explored three-layered rationality concept; legal, implementation and exploitative rationality. The argument maintained in this study is that this rationality trichotomy is a useful lens to understand transfer pricing as a tax avoidance tool, and that international standards are not universal and so each country's unique situation should be addressed at a domestic level.

Key terms

Transfer pricing, tax avoidance, exploitative rationality, impression management, tax haven, MNEs, qualitative inquiry, international guidelines, domestic standards, Zimbabwe.

OPSOMMING

Zimbabwe het in 2016 bepaalde oordragprysingswetgewing ingestel om onregmatige belastingstrategieë deur belastingbetalers te voorkom. Hierdie studie het 'n kwalitatief-interpretatiewe ondersoek gebruik om die toereikendheid van die nuwe oordragprysingsregime te assesseer. Die studie lewer 'n bydrae tot die kennismateriaal omdat dit oordragprysing as 'n belastingvermydingsinstrument ondersoek, 'n konsep wat in sy kinderskoene in akademiese belastingliteratuur staan. Dit verken ook 'n metodologiese gaping deur 'n kwalitatiewe ondersoek te gebruik op 'n gebied wat deur kwantitatiewe navorsing oorheers word. Omvattende onderhoude en dokumentbeoordelings is gebruik om data in te samel en deduktiewe inhoudsontleding is met behulp van ATLAS.ti 8™ gedoen. Hierdie studie bevestig vorige bevindinge dat belastingkonsultante 'n baie belangrike rol speel by die nakomingsbesluite van multinasionale ondernemings (MNO's), gebaseer op die ondersoek van die uitbuitende strategieë wat deur hierdie MNO's beoefen word. 'n Vergelyking van die Organisasie vir Ekonomiese Samewerking en Ontwikkeling (OESO) en die Verenigde Nasies (VN) se oordragprysingsriglyne om die toepaslikheid van internasionale riglyne ten opsigte van Zimbabwe se bepaalde behoeftes te bepaal, het gehelp om die eietydse dilemmas van globale standaarde versus huishoudelike standaarde bloot te lê. Hierdie studie stem ooreen met die kennisgaping rakende die oordragprysingsverskynsel in Zimbabwe deur deur die lens van 'n onderontgindedrielaag-rasionaliteitskonsep, naamlik wetlike, implementerings- en uitbuitende rasionaliteit, te kyk. Die studie voer aan dat hierdie rasionaliteitsdrieledigheid 'n nuttige manier is om oordragprysing as 'n belastingvermydingsinstrumente te verstaan, dat internasionale standaarde nie universeel is nie en dat elke land se unieke situasie derhalwe op 'n huishoudelike vlak aangespreek moet word.

Sleutelterme

Oordragprysing, belastingvermyding, uitbuitende rasionaliteit, indrukbestuur, belastingtoevlugsoord, MNO's, kwalitatiewe ondersoek, internasionale riglyne, huishoudelike standaarde, Zimbabwe

ISIFINQO

Ngonyaka we-2016, izwe laseZimbabwe lithula imithetho ebhekene ngqo nokwedluliselwa kwezezimali zentengiselwano ukuvimbela ukusetshenziswa ngendlela esakuhlukumeza amasu ezentela ngabakhokhintela. Lolu cwaningo lusetshenziselwa uphenyo olukhombisa ukuhumusha okuphathelene nobungaki bento ukuze luhlolisise ukudluliselwa kwesikhathi sokuphatha esisha ekudlulisweni kokubekwa kwamanani emali. Ucwaningo lunomethelela olwazini olufanele ngokuthi lihlola ukubekwa kwamanani njengethuluzi eligwema ukukhokhwa kwentela, njengomqondo osesesigabeni sokuqala ukukhula ezifundweni zemibhalo yezentela. Ngaphezu kwalokho, sikhuluma ngegebe elikhombisa indlela yokwenza izinto ngokusebenzisa uphenyo olukhombisa ubungako bento endaweni egxile ocwaningweni olubheke obungako bento. Ukuthola ulwazi ngalokhu kuye kwasetshenziswa izinhlolokhono ezijulile kanye nokubuyekezwa kwemiqulu yamabhuku, kanye nokusetshenziswa kokuhlaziya okuqukethwe okuphunguliwe ngokubambisana nosizo le-ATLAS.ti 8™. Lolu cwaningo luqinisekisa okutholakale ngaphambilini okubonisa ukuthi abeluleki bezentela badlala indima ebalulekile ezinqumweni zokuthobela imithetho yezinkampani zamazwe angaphandle ngokusekelwe ekuhlolweni kokuxhashazwa kwamasu enziwa yizo izinkampani zamazwe angaphandle. Ukuqhathaniswa kwe-OECD kanye ne-UN mayelana nokudlulisela imihlahlandlela yamanani ekufuneni ukusebenza kwemihlahlandlela yeziqondiso zomhlaba wonke ngokwezidingo zaseZimbabwe kusize ekwembuleni izinkinga zesikhathi esizayo emazingeni omhlaba ngokuhambisana namazinga ezindinganiso zomhlaba jikelele ngokuhambisana namazinga asekhaya. Lesi sifundo siphendula igebe lolwazi elimayelana nokwedluliselwa kwesimo sokubekwa kwenani lemali kwezezintengiselwano eZimbabwe ngokusetshenziswa kokubhekwa komqondo onezigaba ezintathu ongaphansi kwesilanganiso sokuhlola, okungumthetho, ukwenziwa kwakhona kanye nokuxhashazwa kwemiqondo. Lolu cwaningo luphikisana nokuthi lomqondo ongunxantathu yinto ebhekwe ngamehlo abomvu futhi ebalulekile ekuqondeni ukudluliselwa kokubekwa kwesimo sezemali njengethuluzi lokugwema ukukhokhwa kwentela, okusho ukuthi amazinga omhlaba awasiyo into efanayo nokuthi izwe ngalinye linesimo salo esingafanani nelinye okwenza ukuthi isimo ngasinye sibhekwe ngokwesimo sezinga lasekhaya.

Amagama abalulekile

Ukudluliselwa kokubekwa kwesimo sezezimali, ukugwema ukukhokhwa kwentela, ukuxhashazwa kwemiqondo, ukuphatha okuhlaba umxhwele, , indawo yentela, izinkampani

zamazwe angaphandle, uphenyo olukhombisa ubungako bento, imihlahlandlela yomhlaba jikelele, amazinga asekhaya, iZimbabwe.

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DEFINITION OF TERMS

Arm's Length Principle (ALP) – matches the price charged for transactions between associated enterprises with the price that would have been obtained between independent enterprises (OECD, 2017:35).

Associated Enterprise – also referred to as a related enterprise or party means a near relative of the person, a partner, a trustee of a trust, a partnership in which the person is a partner and controls at least 50% of the rights to the partnership's income or capital, and a company controlled by the person alone or with other associates (Section 2A of the Zimbabwe Income Tax Act (23:06).

Cross-border transaction – is a transaction in international trade involving two or more countries (Lohse, Riedel, & Spengel, 2012:2).

Controlled Transactions – are transactions between associated enterprises (Cristea & Nguyen, 2014:2).

Multinational Enterprise (MNE) – is a corporation that manages production or delivers services in more than one country. It can also be referred to as an international corporation (Oguttu, 2006a:141).

OECD Transfer Pricing Guidelines – means the OECD Report on Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, published in July 2010, and supplemented from time to time with additional chapters and revisions to the contents thereof (OECD, 2010a:4).

Profit Shifting – is shifting income from higher-tax to lower-tax or no-tax jurisdictions (Dharmapala & Riedel, 2012:2).

Tax Avoidance – is the legal utilisation of a tax regime to one's advantage, to reduce the amount of tax that is payable by means that are within the law (Oguttu, 2006a:138).

Tax Evasion – is deliberately using illegal means to avoid paying tax (Batrancea, Nichita, Batrancea, & Moldovan, 2012:14).

Tax Havens – are countries that provide a tax environment, which does not only offer favourable tax laws (little or no tax liability) for non-residents, but also promotes profit shifting through transfer pricing (Davies, Martin, Parenti, & Toubal, 2014:2).

Tax Consultant – sometimes referred to as a tax practitioner, refers to accountancy and audit firms, which offer tax advisory services (Hasseldine, Holland, & van der Rijt, 2012:535).

Thin Capitalization – using higher proportions of debt than equity in order to obtain a tax advantage (Oguttu, 2017:16).

Transfer Pricing – is the technique used to come up with a price at which an enterprise in country 'A' transfers goods or renders services to an enterprise in country 'B' belonging to the same multinational group (Klassen, K, Lisowsky, & Mescall, 2017:456).

Uncontrolled Transactions – are transactions between independent enterprises (Cristea & Nguyen, 2014:2).

ACRONYMS

AFRODAD	African Forum and Network on Debt and Development
ALP	Arm's Length Principle/Price
APA	Advance Pricing Agreement
ATAF	African Tax Administration Forum
BEPS	Base Erosion and Profit Shifting
DTA	Double Tax Agreement
GAAR	General Anti-Avoidance Rules
GFI	Global Financial Integrity
MOF	Ministry of Finance and Economic Development
UNCTAD	United Nations Conference on Trade and Development
OECD	Organisation for Economic Cooperation and Development
MNE	Multinational Enterprise
SADC	Southern African Development Community
TC	Tax Consultant
ZEPARU	Zimbabwe Economic Policy Analysis and Research Unit
ZIMCODD	Zimbabwe Coalition on Debt and Development
ZIMRA	Zimbabwe Revenue Authority

CHAPTER 1: INTRODUCTION

"Like mothers, taxes are often misunderstood, but seldom forgotten" - Lord Bramwell

1.1 Introduction

This chapter provides a preliminary background to transfer pricing and the challenges that goverments across the globe are facing due to this phenomenon. The chapter also contextualises transfer pricing in Zimbabwe and clarifies the focus of this study by defining the problem statement and the ultimate purpose of thesis. The specific research objectives are then described, the significance of the study highlighted and the methodology and limitations explained. The chapter concludes by providing an overview of the remaining chapters and structure of the thesis.

1.2 Background to the study

Multinational Enterprises (MNEs) are corporations operating in more than one country with their operations transcending national borders (Organisation for Economic Cooperation and Development (OECD), 2008:12) for diverse reasons, including cheap labour and slack environmental standards (Ahiakpor, 2010). MNEs contribute significantly in their host countries (countries where they invest) by means of technological advances, employment and contributions to the national revenue (McNair, Dottey & Cobham, 2010:2). Novikovas (2011:5) also found that the amount of cross-border transactions concluded between associated enterprises exceed 50% of all international trade. Despite the benefits associated with MNEs, they can also pose risks to the host economies in the form of lost revenue through tax avoidance (Oguttu, 2006a:140). Asongu (2015:11) stated that the ever-increasing growth in global trade has provided MNEs with opportunities for crafting 'tax avoidance' transfer pricing strategies, thereby exploiting the natural resources of the developing countries. The increased growth in international trade indicates the magnitude and importance of transfer pricing with MNEs being the major players in international trade whose operations are interrelated and transactions complex, leaving host economies susceptible to tax avoidance through transfer pricing.

Tax avoidance by MNEs (central concept of this study) is an enormous global challenge (Sikka, 2009) as there are more than 82 000 MNEs worldwide (Eden & Smith, 2011:2). Tax avoidance

entails reducing one's tax liability by exploiting the flaws and loopholes in the existing legislation (Fuest, Spengel, Finke, Heckemeyer, & Nusser, 2013:1). Benari (2009:4) describes it as 'creative' exploitation of tax laws by taxpayers at the expense of the citizens. Sikka and Willmott, (2010:2) describe transfer pricing as a technique for optimal allocation of costs and revenues among divisions, and subsidiaries within a group of associated enterprises. Ekstrom, Dall, and Nikolajeva (2014:7) define it as the process of establishing the transfer price in associated party transactions. The United Nations (2013) describes transfer pricing as the setting of prices for cross-border transactions between associated enterprises. Oguttu (2006a:139) defines it as a systematic way of manipulating prices to avoid taxes. For the purposes of this thesis, the researcher follows Oguttu (2006a:139) and defines transfer pricing as the setting of prices for controlled transactions between associated enterprises in order to minimise their tax liability.

Unlike tax evasion, tax avoidance is legal (Kadet, 2016). However, in its legality, nations are losing revenue, which could have been used for the provision of strategic goods and services (Sikka & Willmott, 2010:27). Taylor and Richardson (2012:1) found that enterprises use a combination of strategies to avoid tax, but a substantial amount of revenue is lost through transfer pricing (Sikka, 2009). Christensen (2012:49) echoed that tax avoidance, particularly through transfer pricing, distorts competition in favour of MNEs as they use transfer pricing extensively to shift profits to tax havens.

Sikka (2009) described transfer pricing as the biggest tax avoidance scheme of all with 60% of world trade occurring internally among MNEs. Transfer pricing is thus a double-edged sword which can be used either positively or negatively. The United Nations Conference on Trade and Development (UNCTAD, 2014), in a press release, stressed that:

> *"As for corporates, their main vehicle for tax avoidance or evasion and capital flight from developing countries is the misuse of ransfer pricing... "*

The significant revenue losses in developing countries have been supported by both anecdotal and empirical evidence as explained below. Several studies (Fuest, Hebous & Riedel, 2011:1; Lohse, 2012:164; Fuest & Riedel, 2010) have found evidence of income shifting through tax

planning activities by MNEs in developing countries. Henry (2012) estimated that transfer pricing has accounted for about 80% of financial outflows from developing countries. Majoni (2015), in a report entitled "Zimbabwe loses US$12 billion to multinationals", also explains how Zimbabwe lost large amounts of revenue from financial outflows in the last three decades.

The African Forum and Network on Debt and Development (AFRODAD) and the Zimbabwe Economic Policy Analysis and Research Unit (ZEPARU) (2014:5) and ZIMCODD (2014:35) reported that Zimbabwe is indisputably losing funds through siphoning to other countries because of its weak tax system, which lacks transparency and accountability. One recently reported case of a transfer pricing scheme in Zimbabwe is that of Econet Wireless which was unearthed by a Zimbabwe Revenue Authority (ZIMRA) forensic audit report of 2016 where Econet is alleged to have overstated prices through its sister company Econet Capital in Mauritius, resulting in a tax revenue loss for Zimbabwe of US$300m (Sunday News online, 2017).

A weak tax system is a cause for concern especially as Beer & Loeprick (2013:2) found that the existing regulatory framework in host countries is a potential driver of MNEs' profit shifting. In their investigation on the impact of tax enforcement on income shifting by MNEs, Beuselinck, Deloof and Vanstraelen (2014:1) established robust evidence of income shifting when local tax enforcement is weak. Murphy (2012) stressed that the chances of transfer pricing taking place is increased by the absence of or the worsening weak enforcement of related rules and regulations in developing countries. The Guardian (2015) added that the following had to be done in order for developing countries to be able to finance their Sustainable Development Goals (SDGs):

> *"First, ensure fair taxation. Governments and international institutions now have to make good on promises to fight tax avoidance and tax evasion. Second, strengthen tax inspectors. Developing countries need support to broaden their tax base and build tax collection capacity."*

Such a statement is strong enough to spur interest to conduct a study on tax avoidance from international trade as increased trade should be matched with increased fiscal revenues. The injustices brought by tax avoidance expose Zimbabwe to abject poverty and cripples its ability to

economically develop and meet its obligation to provide public goods and services (Sikka and Willmott, 2010:30). This is detrimental to an already crippling economy faced with economic, political and social instabilities, weak legislative systems (Zimbabwe Environmental Law Association (ZELA), 2016:24), few operating industries and high unemployment (Kwaramba, 2016). While the magnitude of global trade is vast, Murphy (2012) notes that the possibility of transfer pricing detection to be very low, yet the incentive to transfer price is immense. He attributes this to the secretive nature of MNEs and weak regulation.

In response to transfer pricing abuse by MNEs, the OECD delineated five methods that seek to determine the transfer prices of controlled transactions according to the widely accepted arm's length principle. The United Nations (UN) has also issued transfer pricing guidelines for developing countries which follow the OECD principles (UN, 2017). However, there has been heated debate over the applicability of the OECD guidelines to developing countries by Durst (2015a) and Oguttu (2016:20) which this study sought to address by examining the applicability of the UN and OECD guidelines to the Zimbabwean context. This examination will aid in uncovering any deficiencies experienced by developing countries in applying international standards. An examination of this kind is supported by Oguttu (2016:18-20) who acknowledged that Africa's fight against Base Erosion and Profit Shifting (BEPS) is weakened by irrelevant international tax laws which fail to capture its specific needs. BEPS refers to tax planning strategies by MNEs to shift profits to low tax countries (Oguttu, 2016:6). Murphy (2012) further noted that even though arm's length rules exist in developing countries, problems of enforcing them are overwhelming. ZELA (2016:31) also believes that the implementation of laws and policies is a big constraint in Zimbabwe.

While many developed economies, and some developing countries legislated transfer pricing decades ago, Lohse (2012) points out that there still remain a sizeable number of countries with slack transfer pricing regulations. For many years, Zimbabwe had anti-avoidance measures in place [Section 98 of the Income Tax Act (ITA) Chapter 23:06 (1996)], which only granted the Commissioner power to disregard any transactions which the Commissioner deemed to be solely for tax avoidance purposes. However, in 2014 the country amended its anti-avoidance rule [Section 98 of the Income Tax Act Chapter 23:06 (1996)] as the Minister of Finance said that

these rules lacked sufficient guidance on the reporting procedures for taxpayers (National Budget Statement, 2016:251). The amendments to the anti-avoidance rules incorporated transactions between associated enterprises and income splitting between associates. In January 2014 the section was split into Section 98A (income splitting) and 98B (anti-avoidance). In January 2016, the country introduced specific transfer pricing rules (with the 35th schedule amending Section 98B) which follow the arm's length principle in line with the OECD guidelines (Hudzerema, 2016).

The Zimbabwean economy remains peculiar after having been severely hit by: (i) a world-breaking hyperinflation rate in 2008; (ii) erratic changes in policies over the years; (iii) undefined currency; and (iv) lack of statistical data (see Kwaramba, Mahonye & Mandishara, 2015:3). As a consequence, more financial resources are required to resuscitate the struggling Zimbabwe economy (ZELA, 2016:1). In light of these concerns, and Zimbabwe's decision to promulgate transfer pricing rules in 2016, the assessment of their adequacy and enforcement is necessary. Bradley (2015:65) hinted that MNEs view taxes associated with transfer pricing as costs to avoid. This potentially exposes Zimbabwe to errant taxpayers, which raises the question of which legislative path to take given the global disparities in tax systems. The choice would be between maintaining consistency with international standards or exercising national sovereignty to meet the country's particular needs (Dharmapala, 2014:2).

Maya (2015:7) reported that domestic revenues for many developing countries are way below the levels needed to meet public demands, and believes that if transfer pricing abuse by MNEs is addressed, enough revenue would be generated to finance these demands. The world's average government revenue percentage to GDP is 30.23%, and Zimbabwe's 2017 ratio was estimated at 25.80% which is 4.43% less than the average (Economywatch, 2018). UNCTAD (2014) also stressed that in order to finance their Sustainable Development Goals (SDGs), developing countries would need a tax system that helps to increase their tax revenue. Context-wise, Zimbabwe becomes an important research setting to which this study is able to contribute pragmatic recommendations to. This context gap serves as an inspiration for this study.

Following the accusations that MNEs siphon taxable profits out of Zimbabwe, the availability of various transfer pricing methods (UN, 2017) and the recently enacted transfer pricing legislation (Section 98B of the ITA), this study considers the diverse transfer pricing methods and the strengths and limitations of the legal and administrative capacities of ZIMRA in regulating cross-border transactions. It departs from the conventional quantitative methods that are common in tax compliance studies as alluded to by Finer and Ylonen (2017) and follows the qualitative paradigm to achieve the research objectives. This paradigm shift from traditional accounting literature was given impetus by the study objectives and motivated by Collins and Mulligan (2014) who employed qualitative methods and interviewed tax consultants in Ireland. Their research was limited to the experiences of tax consultants and they recommended additional research which considers other stakeholders such as tax legislators be undertaken. Collins and Mulligan (2014) applied the new institutional theory in their study and proposed future research which draws on alternative theoretical views to enhance understanding of the transfer pricing concept. The methodological standpoints and theoretical underpinnings applied in the current study respond to this call and attempt to uncover abusive transfer pricing practices in Zimbabwe despite noting that tax avoidance research inclines towards post/positivist paradigms.

Transfer pricing continues to be a global issue and the measures and guidelines intended to mitigate tax avoidance through transfer pricing are continuously being revised and progressively changing (Oguttu, 2016:9). Therefore, this provoked curiosity in the researcher and informed the research problem, research questions and research objectives that guide this study.
This gives rise to consideration of the problem statement.

1.3 Problem Statement

Zimbabwe, among other developing countries, is losing billions of dollars of tax revenue through transfer pricing practices by MNEs. This is mainly attributed to dysfunctional regulation, weak enforcement and corruption (ZIMCODD, 2014). Observing the increase in revenue leakages through manipulation of transfer prices by MNEs, Zimbabwe introduced transfer pricing rules in January 2016 which follow the arm's length principle recommended by the OECD. However, the transfer pricing rules applied in Zimbabwe may not be applicable in Zimbabwe as expected, due to different economic conditions and technological advances in other countries. Considering the

importance of international trade worldwide, and given the scale, nature and complexity of the transactions amongst these MNEs, it is imperative for governments, including Zimbabwe, to be conscious of and cautious to prevent tax avoidance through cross-border trade. Oguttu (2016:24) also emphasizes the importance of a continuous review of legislative and administrative frameworks. This spurred interest in the researcher to assess the ability of the tax reforms undertaken by Zimbabwe to reduce tax avoidance, generate more revenue and alleviate poverty in the country. Besides the context gap, the literature signals a number of important theoretical and scholarly gaps which also give momentum to this research.

1.4 Purpose of the Study

The purpose of the study is to assess the legislative and administrative measures adopted by Zimbabwe to regulate MNE's cross-border transactions, in order to protect its tax base from leakages through transfer pricing without impeding foreign investment in Zimbabwe as guided by rationalisation and qualitative methods. The legislative, administrative and literature gaps in the Zimbabwean context are highlighted from this assessment. The study modestly theorises the notions of MNE tax avoidance as well as behaviour, and the attendant responses of tax authorities and tax administration and therefore address an academic gap by providing novel findings. It expands the literature on the implications of transfer pricing at social and economic dimensions in Zimbabwe - an area which Sikka and Willmott (2010:28) believe is neglected. The research objectives are delineated for this study as shown in the next section.

1.5 Research Objectives

Empirical and anecdotal evidence agree that billions of dollars are lost by developing countries through transfer pricing (AFRODAD & ZEPARU, 2014). Therefore, an assessment of Zimbabwe's laws and the administrative capacity of ZIMRA to effectively implement these laws would inform policy makers and tax authorities of any loopholes and help them plug these loopholes as well as stimulate behaviour change in taxpayers. In pursuit of the aforementioned goal, the following research objectives guided the study:

1. To explore the transfer pricing methods outlined in the OECD and United Nations (UN) guidelines.

2. To compare the laws and policy measures that regulate transfer pricing in Zimbabwe against the OECD guidelines and the UN guidelines.
3. To examine measures in other countries that curtail transfer pricing in order to draw lessons for Zimbabwe. The researcher firstly chose China and South Africa because they are part of the five major emerging economies; Brazil, Russia, India, China, South Africa (BRICS) that are also Zimbabwe's major trading partners (Kwaramba et al, 2015:2). BRICS is a group of the largest emerging economies. Secondly, the United Kingdom and Kenya were chosen because the former is also one of Zimbabwe's major trading partners (representing the developed world), and the latter representing another important developing economy which has been aggressive in fighting transfer pricing abuse.
4. To examine the nature and types of transfer pricing strategies utilised among MNEs in Zimbabwe by means of a document review and then operationalising it in an interview schedule to assess whether Zimbabwean rules are enough to curtail tax avoidance through transfer pricing.

1.6 Research Questions

To achieve the above research objectives, the following research questions are asked:

1. What are the different measures that can be used to mitigate transfer pricing as outlined in the OECD and United Nations guidelines?
2. What are the laws and policy measures that currently regulate transfer pricing in Zimbabwe?
3. Which measures are employed by other countries (such as the United Kingdom, South Africa, Kenya and China) to counter tax avoidance by means of transfer pricing?
4. What are the main types of transfer pricing strategies used by Zimbabwean MNEs to avoid tax and are these addressed by the laws and policy measures currently adopted by Zimbabwe?

1.7 Significance of the Study

Extant literature shows that extensive research on transfer pricing has been conducted mainly in developed economies (for example, Ekstrom et al, 2014; Beuselinck et al, 2014; Davies et al, 2014; Cristea & Nguyen, 2014; Beer & Loeprick, 2013; Lohse & Riedel, 2013; Lohse, Riedel & Spengel, 2012; Taylor & Richardson, 2012; Heckemeyer & Overesch, 2013; Klassen &

Laplante, 2012; Solilova, 2010; Weichenrieder, 2009). However, in developing countries research on transfer pricing is still nascent. De Waegenaere, Sansing and Wielhouwer (2006:138) report that the interaction between tax compliance and transfer pricing has received less attention in academic literature than in the practitioner literature, and this study fills this academic gap.

The current study is policy-oriented and as such seeks to contribute to the knowledge of legislators and tax authorities (Dul & Hak, 2008) as well as educate taxpayers (MNEs) on how the new transfer pricing regime impacts them. Given that Zimbabwe has recently promulgated rules designed to limit tax avoidance through transfer pricing against the MNEs' tax planning strategies, the need to assess these rules becomes crucial as Solilova (2010) stresses that transfer pricing rules should prevent taxpayers from shifting income. The rules follow the OECD guidelines which are rationally anchored. Wells and Lowell (2014), however, believe that foundational problems with transfer pricing are rooted in the long standing OECD Transfer Pricing guidelines. Oguttu (2016:20) encourages transfer pricing research that address specific needs at national level and Dharmapala (2014:4) acknowledges the limitations of the BEPS Action plan in addressing domestic problems. This study seeks to understand the nature of transfer pricing in Zimbabwe in order to influence policy and its implementation by asking questions like how well it works (Ritchie & Lewis, 2003) in a bid to appraise the effectiveness of what is in existence. This study intends to address scholarly gaps by contributing new knowledge by exploring an under-explored and researcher-conceptualised three-layered rationality view. As is required of a study at this level, the researcher has built on existing theoretical frameworks deemed relevant to the research objectives and direction of this study. The three-layered view, in terms of 'rationality', is not written up, as yet, outside of this study. The study uncovered these notions, and presents the theorising thereto, as the original contribution. The direction that the study took captures the subjective human dimensions which Li (2005:47) indicates are neglected in the existing transfer pricing theory.

The methodological and epistemological positions applied in this study depart from the current mainstream approaches to such studies, because of the qualitative, interpretive approach as opposed to statistical inferences. They provide insight on transfer pricing at a policy and implementation level. Perspectives experienced by people 'in the trenches', so to speak, are

better able to contribute towards the contemporary dilemmas in global and territorial standards. Dilemmas, as logic advises, are often rooted in human based behaviours and not simply statistical calculations. This study can make an important contribution when considering the tax revenue that would be raised if all economic transactions that are currently escaping tax were taxed by the introduction of a robust tax system that prohibits tax avoidance activities by MNEs. This study therefore contributes to the body of knowledge in relation to transfer pricing with regard to contextual, theoretical and methodological gaps, as highlighted in the introductory paragraphs above. The next section explains the scope of the study.

1.8 Scope of the Study

This study is centred on tax avoidance through transfer pricing of cross-border transactions by MNEs, and does not intend to cover domestic transactions, since revenue lost through these may be negligible (Oguttu, 2006a:139) compared to cross-border transfer pricing. This study considered transfer pricing as a broad concept without looking at specifics such as intangibles. Although reviews of transfer pricing policies in other countries were considered, the focus of this study was restricted to the Zimbabwean economy, as Bird (2008) indicated that generalising about taxation in developing countries may be intricate. The period of the study was from the time Zimbabwe started amending its legislation for transfer pricing purposes i.e. from 2014 to 2018. The targeted population consisted of the drafters of the legislation (Ministry of Finance and Economic Development (MOF)), the enforcers of the legislation/tax authority (ZIMRA) as well as the taxpayers who in this case are the MNEs or the tax consultants (TCs) that assist MNEs.

The role played by the researcher’s supervisor and the qualitative research expert gave the researcher confidence in the methodological philosophies, designs and analytical tools used in this study as explained below.

1.9 Research Methodology

Research design outlines the procedures for each research activity in order to fulfil the research objectives (Cooper & Schindler, 2011). This study sought to find appropriate solutions to revenue leakages through transfer pricing. The ontological views of this study as influenced by

Tracy (2013) are that the social phenomenon (transfer pricing) is created from the rational economic decisions and consequent actions of social actors [MNEs ZIMRA; MOF, Tax Consultants]. This study holds that social actors such as taxpayers (MNEs) may place different interpretations on the situations in which they find themselves as a result of their own views of the transfer pricing rules (Tracy, 2013:58). These different interpretations are likely to affect their actions (for instance how much tax they pay). This study, therefore, seeks to understand the subjective reality (epistemology) of MNEs in order to be cognisant of their differentiated motives, actions and intentions in a meaningful way. The axiological view is that the human-infused dimensions around transfer pricing have knowledge value (Tracy, 2013:61).

The research followed an interpretivist research paradigm using a qualitative approach (Denzin & Lincoln, 2005). Quantitative measures and the statistical analysis thereof would not be coherent with the research objectives (Creswell, 2007:40), given that the research questions and intent refer to human decision-making and behaviours. The navigation of 'rational' legislative systems in an assumed conscious as well as contradictory manner, opened up this study appropriately to the approaches, design and methods, as influenced by the lived context. This allowed for the probing of assumed theory in the context of the researcher's positionality in which experiential views are considered in relation to their meaning in participants' words as well as the researcher's interpretation.

Methods of data gathering included a document review and in-depth interviews (Kvale & Brinkmann, 2009). These choices were made in order to corroborate the results and achieve the research objective coherently (Bowen, 2009:28). The targeted population consisted of the drafters of the legislation (Ministry of Finance and Economic Development (MOF)), the enforcers of the legislation/tax authority (ZIMRA) as well as the taxpayers who in this case are the MNEs or the tax consultants (TCs) that assist MNEs. The researcher drew samples of persons and text purposefully to glean the most knowledgeable sources to respond to the research objectives and research questions. Data gathered from both MNEs and tax consultants enlightened the research on the effectiveness of the transfer pricing rules together with some of the transfer pricing strategies used by MNEs. Sikka and Willmott (2010:28) espoused that research on the commercial tax avoidance strategies sold by accountancy firms to MNEs has

been neglected by accounting researchers that predominantly focus on auditing and accounting. Purposive sampling (Marshall, 1996) and the snowball sampling techniques (Noy, 2008) were employed to select the most relevant information-rich participants. Snowball sampling was useful in getting data on the MNEs perspective of transfer pricing rules. The first identified MNEs (through peer references) were requested to refer the researcher to other potential MNE participants. These participants were approached and added to the respondents list based on their cooperativeness. Others referred the researcher to their tax consultants who were also interviewed. This procedure was repeated until the sample size was sufficiently large to understand the nature of the phenomenon (Collins & Mulligan, 2014).

Deductive and inductive content analysis (Elo & Kyngas, 2008:107) served as the data analysis method. To intensify rigour, integrate and manage data and to demonstrate transparency of analysis, the computer assisted qualitative data analysis software, ATLAS.ti 8™ was used. Confidentiality of the project was safeguarded through password protection and erasing of personal identifiable information. All ethical considerations were observed (see Chapter 6, Section 6.9). Organising, categorising, coding and distilling of data were undertaken to make informed conclusions regarding the adequacy of the current transfer pricing rules in Zimbabwe.

Having discussed the methodological approaches of this study, it is important to indicate the research limitations.

1.10 Limitations of the Study

The initial limitations are summarised in Table 1 while further limitations are discussed in the concluding chapter (Chapter 8, Section 8.7).

Table 1: Limitations and Sphere of Limitation

Limitation	Sphere of Limitation
Scope	The focus of the study is on the transfer pricing regime in Zimbabwe, and is limited to transfer pricing of cross-border transactions by MNEs, and does not distinguish intangibles from tangibles, and neither does it transcend to domestic transactions since revenue lost through these may be negligent compared to cross-border transfer pricing (Oguttu, 2006a:139). Tax avoidance was not considered in detail as there is a vast body of knowledge (Kirchler, Maciejovsky and Schneider, 2001; Sikka and Willmott, 2013; Dowling, 2014) on this subject and this study focuses only on transfer pricing as a means of tax avoidance. Although literature has sought to draw lessons from other jurisdictions, the review was limited to four carefully selected countries. It is, however, recognised that while there are other similar countries that could have been considered, attention was given to data deemed relevant and accessible to achieve the desired research objective.
Design and methodology	The study adopted a qualitative approach and methodologies followed included purposive sampling (Marshall, 1996). In order to mitigate potential bracketed bias (acknowledged by qualitative research), snowball sampling was employed to increase purposive coverage of knowledge invested in the participants (Noy, 2008).
Access	Due to the sensitivity of taxation studies, more so transfer pricing, the major limitation of this study was gaining access to MNEs as these were less willing to participate for fear of victimisation. However, the researcher only worked with those who were responsive to participating in the study. Participation was voluntary. Some MNEs also referred the researcher to their tax consultants. This assisted the researcher in gaining access to relevant and larger sets of data than what would have been gathered directly from the MNEs (refer to Chapter 7). Access to primary legislation for the selected tax jurisdictions was a challenge, and in such instances the researcher resorted to secondary data in order to review the transfer pricing guidelines of these countries (see chapter 5).
Secrecy Act	The declaration of confidentiality and secrecy by ZIMRA officials as well as the Ministry of Finance staff at their time of recruitment was anticipated to impede their freedom to disclose sensitive information. However, participants cooperated during the study. Ethical treatment of data also provided security for the participants. The researcher circumvented this limitation by researching information from published documents.
Population	Since there is no MNEs database available in Zimbabwe, the researcher would have preferred to use the ZIMRA portfolio of MNEs to define the research population. Unfortunately, efforts to obtain the ZIMRA list of MNEs were in vain. Consequently, the MNEs sample frame was limited to MNEs identified through snowball sampling. This led the researcher to participants based in the head offices of MNEs located in Zimbabwe's main cities, i.e. Harare, Bulawayo and Gweru (Chakaipa, 2010:36).
Findings	The findings have been generated from a purposive sample of drafters and enforcers of legislation as well as snowball sampling of MNEs and tax consultants in Zimbabwe. The findings have been derived through deductive and inductive content analysis of both interview data and data obtained during the document review (Elo& Kyngas, 2008:107). Extensive efforts have been made to ensure credibility, trustworthiness, consistency and conformity of the results. However, the findings are limited to cross-border transactions of MNEs in general, and cannot be transferrable to specifics like intangible assets.

Source: Own Compilation

The study does not claim to be transferrable or generalisable as per quantitative norms (Burns & Burns, 2008). The researcher has positioned herself and the study within the qualitative approach, which means that criteria such as credibility, consistency, conformity and trustworthiness (Moon, Brewer, Januchowski-Hartley, Adams, & Blackman, 2016; Denzin & Lincoln, 2011) of the data is provided.

1.11 Structure of the Thesis

The main outcome of the research takes the form of a thesis. A discussion of the structure of the thesis is provided below.

Chapter 1: Introduction

This chapter provides a background and introduction to the study by highlighting the importance of researching tax avoidance through transfer pricing by MNEs. The chapter also discusses the rationale for and the aim and objectives of the research and summarises the research design and methodology used. It clarifies the limitations and assumptions relevant to the study.

Chapter 2: The Transfer Pricing Concept and Theoretical Constructs

The chapter provides an overview of the transfer pricing principles and explores the theoretical and conceptual foundations guiding the study. It describes how tax avoidance is perpetrated using transfer pricing by discussing the various transfer pricing strategies that MNEs use to avoid tax. This chapter thus addresses objective 4.

Chapter 3: Zimbabwe's Transfer Pricing Rules

This chapter discusses the background of transfer pricing in Zimbabwe together with the transfer pricing provisions within the Zimbabwean legislation in order to effectively assess them, and compares them with international guidelines discussed in Chapter 4. The chapter concludes with a summary of the transfer pricing strategies used by MNEs in Zimbabwe in order to make informed recommendations to solve the transfer pricing problem. This chapter mainly addresses research objective 2 and also parts of research objective 4.

Chapter 4: International Guidelines

The chapter provides a deeper understanding of the transfer pricing methods provided by the OECD and the United Nations' international guidelines. It considers the advantages and disadvantages of these guidelines as well as assessing their applicability to the developing world. This is done by critically exploring the Arm's Length Principle, Advance Pricing Agreements and transfer pricing documentation provisions. By examining the applicability of the OECD and UN guidelines to the Zimbabwean context, this chapter widely addresses the 1st and 2nd objective.

Chapter 5: Transfer Pricing Best Practices

This chapter describes the experiences of other tax jurisdictions (United Kingdom, South Africa, Kenya and China) that are trade partners with Zimbabwe and have fully implemented transfer pricing regimes. The review of the challenges that were encountered in their legislative frameworks, challenges faced by tax authorities, measures employed to counteract transfer pricing abuse, together with their success stories address objective 3 of the study.

Chapter 6: Research Methodology

This chapter describes the research methodology adopted. It outlines the research paradigm and philosophical positions adopted to achieve the study objectives. The study population, sampling techniques, the research methodologies, data gathering instruments and data analysis as well as ethical considerations are explained in detail in this chapter.

Chapter 7: Data Presentation and Analysis

The chapter provides an analysis of the interview data as guided by both research objectives and theoretical positions, discusses the research findings and reconciles the findings from the document review with those from the primary interview data obtained.

Chapter 8: Conclusions and Recommendations

This chapter concludes the research by explaining how the research objectives were achieved, summarises the contextual, theoretical and methodological contributions of the study. It also documents the recommendations that flow from the research, and provides suggestions for future research.

1.12 Summary

Chapter 1 has provided an introductory discussion of the scope of the current research. It sets out the background, rationale and objectives of the research undertaken. The structure of the research in achieving the stated objectives is also discussed. The following chapter defines the theoretical constructs relevant to the current research by reviewing literature.

CHAPTER 2: THE TRANSFER PRICING CONCEPT AND THEORETICAL CONSTRUCTS

"Death is certain, but paying taxes is definitely not — at least, not for everyone" - Blaufus, Bob and Otto

2.1 Introduction

The payment of tax has been described as intricate and 'planned' rather than 'automatic' with complexity issues remaining unresolved (Etienne, 2011). With the increasing growth of international trade and the magnitude of transactions within MNEs, tax authorities, in a bid to protect governments' revenue bases from erosion, are faced with the challenge of knowing about taxation and transfer pricing within such group transactions (Dharmapala, 2014). MNEs, in contrast, continue to create ways of shielding themselves from extensive scrutiny so as to protect their group profits and their competitive niches (McBarnet, 2001). Furthermore, Chapter 1 identified some contextual, methodological and theoretical gaps that exist and revealed that deficient tax systems are vulnerable to transfer pricing abuse by MNEs.

To respond to the gaps identified in the literature, this chapter narrows down transfer pricing as a tax avoidance concept (Section 2.2), discusses transfer pricing as a concept (Section 2.3), considers transfer pricing as a policy issue for tax authorities (Section 2.4) and elaborates upon the theoretical lenses underpinning this study (Section 2.5). The theories set up the basis for the researcher-generated conceptual framework on transfer pricing (Section 2.8). Transfer pricing strategies used by MNEs to avoid tax (Section 2.6) also form part of the discussion together with authorities' reaction to exploitative rationalities (Section 2.7)

2.2 Understanding Tax Avoidance through Transfer Pricing

International trade involving MNEs has brought "the good and the bad" (for example, analogous employment and tax avoidance), which Bateman (2007:110) refers to as the "mixed blessing". Bateman (2007) clearly explains how the tax and employment benefits derived from the existence of MNEs in the host country are set against increasing and irreparable damages to the

economy in the form of socio-environmental hazards, health hazards, low wages, tax avoidance and loss of trust in the MNEs.

Tax avoidance is arranging one's tax affairs in order to minimise their tax liability. When transfer pricing is used for tax reduction, which is referred to by Li, Tim and Dongxian (2017) as tax-motivated transfer pricing it becomes a tax avoidance tool. Fuest et al (2011) has stressed that developing countries are vulnerable to tax avoidance through transfer pricing by MNEs as they shift income from high to low tax jurisdictions. Although previously tax avoidance might have had the blessing of the courts and the law (Hansen, Crosser, & Laufer, 1992:679), the moral conscience has since changed as courts and tax authorities now censure it. Societies argue that the resultant revenue losses have negative effects on the government's ability to follow its economic and social goals and better people's lives (Oguttu, 2016:8, Sikka & Willmott, 2010:27). A case which shows a departure from the previous conception of tax avoidance is in the New Zealand case of *Elmiger v CIR* which held that the:

> *Creative legal devices contrived to enable individual taxpayers to minimise or avoid their tax liabilities are often not merely sterile or unproductive in themselves (except perhaps in respect of their tax advantages for the taxpayer concerned), but that they have social consequences which are contrary to the general public interest* [*Elmiger v CIR* [1966] NZLR 683 (SC) at 686].

A challenge for tax authorities is whether the tax planning by taxpayers is simply a conscious arrangement of one's tax affairs to achieve a minimum tax liability; or if it is an artificial arrangement to manipulate tax laws to achieve outcomes that conflict with, or defeat the spirit of the law (Oguttu, 2016:8). Reference is made to Australia, where there is a form of tax avoidance that ironically follows the letter of the law and not the intention of the law. It is driven by the deliberate exploitation of structural loopholes in the law, such as transfer pricing. Oguttu (2016:8) also refers to what is termed 'impermissible tax avoidance' in South Africa, meaning tax avoidance practices that spread beyond what is legally acceptable, for instance taxpayers hiding their assets and income in low-tax and tax-haven countries. The bulk of tax avoidance has been said to be occurring through transfer pricing (Taylor and Richardson, 2012). Collier (2013)

as cited in Maya (2015) describes transfer pricing as a well established method of avoiding tax. Benari, 2009 also emphasizes how transfer pricing can be used to distort tax liability.

2.3 The Transfer Pricing Concept

Eden (1998); Borkowski (1997); Borkowski (1996); Tang (1993); Kaplan (1990); Eccles (1985); Benke and Edwards (1980); and Lall (1973); Thomas (1971) pioneered the discussions on transfer pricing. Transfer pricing relates to the pricing of transactions between associated enterprises (OECD, 2010a). An associated enterprise refers to a relative of the person, a partner, a trustee of a trust, a partnership in which the person is a partner and controls at least 50% of the rights to the partnership's income or capital, and a company controlled by the person alone or with other associates (Section 2A of the Zimbabwe Income Tax Act (23:06). Transfer pricing facilitates trade between associated enterprises for performance evaluation, decision-making and determining group profits (Ekstrom et al, 2014:53). It allows enterprises to create a lower tax burden for the MNEs by shifting profits to a lower tax country or through other means such as inflating imports (Olivier and Honiball, 2011). Transfer pricing, in itself, is not illicit, but rather the intentional 'mispricing' of transactions for manipulation/shifting of profits in respect of tax. According to Oguttu (2016:8), this is an abuse and constitutes unacceptable tax avoidance.

Transfer pricing issues have been a prime concern globally since the 20th Century. The unprecedented growth of transfer pricing continued over the years to date, with some of the most recent works by Oguttu (2017), Rossing and Rohde (2014) and Holtzman and Nagel (2014). Holtzman and Nagel (2014) introduced the transfer pricing concept while Rossing and Rohde (2014) simply reviewed transfer pricing literature and Oguttu (2017) critiqued some OECD action plans from an African perspective. Although transfer pricing is not a new concept, researchers are at the nascent stages of narrowing it down to specifics such as the nature of the intra-group transfers, for example intangible transfers (Lagarden, 2014; Taylor Richardson and Lanis, 2015). Maya (2015:14) believes that transfer pricing is greatly misunderstood and Cazacu (2017:20) emphasises that it is complex for both tax authorities and for MNEs. This is an emerging area to which this study aims to contribute.

Murphy (2012) attributes the vulnerability of developing countries to the effects of the secretive nature of MNE transactions because of weak legislative frameworks, citing the instance of the top transfer pricing abuse case, Unilever Kenya Ltd vs. Commissioner of Income Tax, Kenya Income Tax Appeal 753, 2003. Murphy (2012) stressed the failure by African states to enforce their transfer pricing rules, saying in as much as the Kenyan revenue authority had a case, they failed to prove the profit-shifting by Unilever because material accounting data of the group was not made available to the court, given the requirements of protection of privileged company information.

Given that MNEs are faced with the challenge of setting transfer prices that are consistent with the host nation's tax requirements, and that these prices will subsequently be used for performance evaluation and rewards (Adams & Drtina, 2010), finding the appropriate price is complex and challenging. This dilemma provides the opportunity for transfer prices to be manipulated by the corporate managers in order to minimise the tax liability (and maximise their group profits), which is one of the main objectives in transfer pricing decision making (Ching-Wen & Hsiao-Chen, 2010). This opportunity makes taxation matters the prime objective for transfer pricing decisions (Bernard, Jensen & Schott, 2006). However, Uyanik (2010) argues that not every transfer pricing incident results in tax avoidance and is used for substantive private sector intentions related to profitability.

2.4 Transfer Pricing as a Policy Issue within Tax Authorities

This section makes a critical appraisal of transfer pricing as a national and international policy, and not as an organisational policy.

De Waegenaere et al (2006:106-107) reveal that there are inconsistencies regarding the treatment of transfer pricing related issues among tax authorities. Li (2006:49) acknowledges that tax systems are heterogeneous among nations and hints that there is bound to be variations on the price to be attached to the same transaction. This creates conflicting information/realities or results in double taxation or under taxing. Li (2006:49) further says that even though there are double taxation treaties, as long as the transfer pricing systems internationally continue to be un-harmonised, the total elimination of double taxation and income shifting is not guaranteed. These

un-harmonised systems validate that tax authorities continue to increase their tax scrutiny on MNEs (Tully, 2012) while the MNEs remain susceptible to double taxation, and are therefore motivated to search for more complex transfer pricing schemes and tax avoidance strategies (Sikka & Haslam, 2007). As a result of the continuous cycle of tax reforms, the inconsistencies and inefficiencies of the transfer pricing system will impact on both the MNE and the tax authority, ultimately impeding foreign investment and consequently causing unintended revenue losses. Revenue losses impact again on livelihoods and other socio-economic conditions of citizens of all affected countries (Sikka & Willmott, 2010).

Ruiz and Romero (2011), drawing on the work of Bagchi, Bird and Das-Gupta (1995:63) listed the problems that come with cross-border trade. These problems include inter alia: over/under-invoicing of goods, abuse of intra-group debt-financing, misclassification of goods and use of tax havens. Bagchi et al (1995:64) identified differing tax rates, exchange rate fluctuations and information dissonance as other challenges of cross-border transactions. This myriad of factors influencing transfer prices provide national tax authorities with distinct challenges around determining the appropriate tax liability in a specific country, and downstream accountability of taxpayers to tax authorities and the people of a region (Novikovas, 2011).

To counteract these "creative compliance" (Sikka & Willmott, 2010:11) stances by taxpayers, governments revise their legislation to reduce or eliminate this behaviour and its repercussions. This can be in the form of introducing significant penalties, new documentation requirements, and increased audit procedures (Holtzman & Nagel, 2014). Therefore, the appropriateness and comprehensiveness of legislation should be considered in the light of sophistication and "creative non-compliance" schemes employed by taxpayers in the specific country (McBarnet, 2001). It is either that the tax authorities come up with transfer pricing rules to minimise the tax avoidance activities of MNEs, or MNEs come up with transfer pricing strategies to counter the rules. This leads to an adversarial approach as opposed to collaborative and productive synergies, as energies get displaced into mutually exclusive behaviours that undermine cohesive co-determination models of growth and social good (McIntosh & Buckley, 2015).

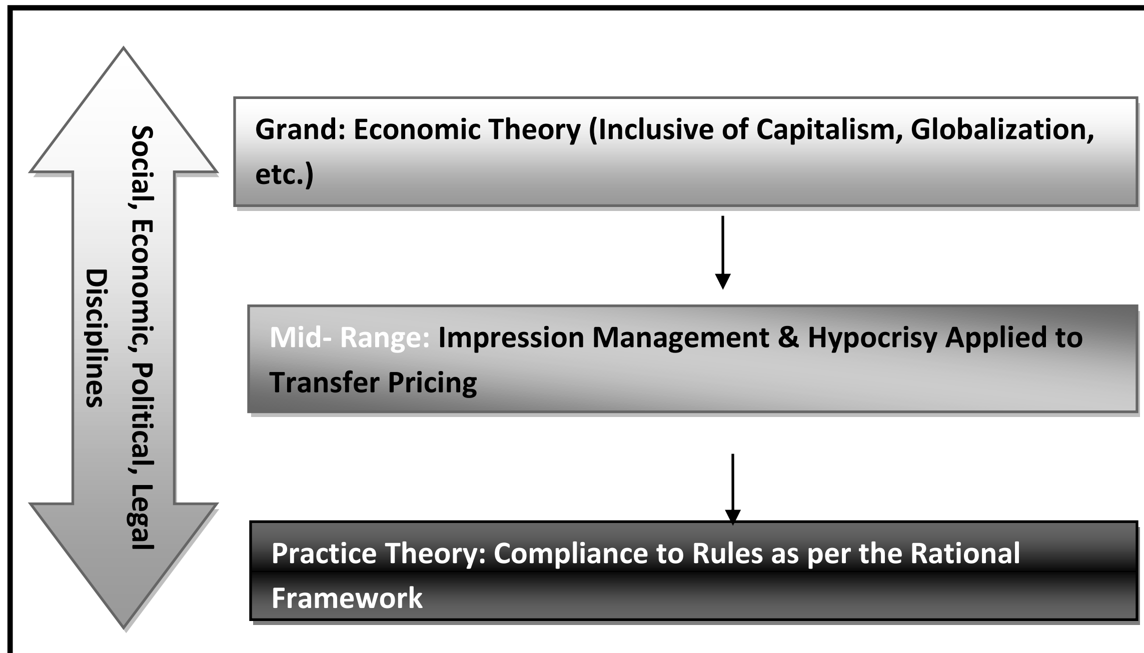
Oguttu (2016:17) iterates that the tax avoidance tendencies by MNEs provide them with an unfair competitive advantage over domestic enterprises especially Small and Medium Enterprises (SMEs). It also potentially limits countries' revenues for economic and infrastructural development thereby leading to citizen impoverishment (Sikka & Willmott, 2010:27). Oguttu (2016:18) highlights that though there is no accurate estimate of the magnitude of profit shifting, the impact is immense and visible. She also describes profit shifting as an outcome of the lack of relevant international tax laws as well as limited tax administrative capacity to assess and audit transfer pricing risks that are exploited by MNEs.

The limited administrative capacity of tax authorities includes unskilled and inexperienced staff, redundant and out-of-support information technology. Dharmapala and Riedel (2012:3) emphasized that African states are victims of the transfer pricing phenomenon as MNEs shift profits to developed countries and low tax countries. Oguttu (2017:20) argues that there is no one size fits all anti-tax avoidance measure and encourages that each country assesses and evaluates its situation in order to come up with sound solutions relevant to it.

The above line of reasoning has established some of the pragmatic and moral conceptions around transfer pricing and MNEs/tax authorities' patterns. As indicated in the introduction, concepts have their groundedness in theories. Transfer pricing, as a concept, has its groundedness in many theories, such as capitalism, globalisation, economic, agency, organisational, to name but a few (Spicer, 1988; Lall, 1973; Collins and Mulligan (2014). Grand theories [see: Wright Mills's work in The Sociological Imagination (1959)] behind transfer pricing include dimensions of economic theories (Hirshleifer, 1956; Grubert & Mutti, 1991; Buckley & Casson, 1985). Within the dimensions of economic theory, rationality theory (Herring & Longaker, 2014), as argued through the scholarly themes below, provides a fitting background for the scholarly advancements of this study. Rationality theory assumes compliance and rule following behaviour (Goodman, Tenenbaum, Feldman & Griffiths, 2008:110) which will be explored in this study through the data reviewed and obtained. Figure 1 overleaf incorporates these discussions above and provides the initial assumptions of the theoretical backdrop to this study, which are later refined in the conceptual framework of this chapter. The early thinking around the unit of

analysis is presented in the initial position, with the development of the thinking firmed up, after the full literature review and then ultimately theorised in Chapter 7.

Figure 1: Initial Theoretical Positions



Source: Own Compilation

The contentions above (and as summarised within the graphic) are discussed in more detail below.

2.5 The Theoretical Perspective

Theories are bundled systems of critical assumptions devised to explain, and understand phenomena, and to test and expand existing knowledge (Yin, 2011). To understand the transfer pricing phenomenon, the theoretical positions are explored from the lenses of grand theory, mid-range theory and practice theory. The theoretical views guiding the study are explained in five sub-sections below.

2.5.1 Grand Theory

Grand theory is employed as it provides universal rather than specific knowledge regarding world affairs (Vidal, Adler & Delbridge, 2015:407). It functions as a basis for legitimizing or

challenging existing policy positions (Eriksson, 2014). Globalisation has resulted in corporates roaming the world in search of cost-savings and higher profits (Sikka & Haslam, 2007:7). This provides MNEs with an opportunity to make policy decisions and develop strategies that could pose tax risks to revenue collection. Christensen and Kapoor (No date:5) underline the lack of mechanisms and capacity by governments to dissect these complex structures and practices yet they rely on tax revenue. This conflict of interest has driven governments into harmful tax competition to attract foreign direct investment (Christensen & Kapoor, No date:1). The competition is supported by several subsidies and tax incentives. This creates concentrated economic power in MNEs which is strengthened by the capitalist ideologies which lead to the creation of transfer pricing strategies that take advantage of tax differences in jurisdictions (Sikka & Haslam, 2007:9). Sikka & Haslam (2007:9) further emphasise that the vulnerability and dependence of developing countries on foreign investment forces them to enter into bilateral and multilateral agreements with the MNEs. It is this "give and take" situation that results in a transfer pricing tug-of-war between tax authorities and MNEs as explained below.

According to Vidal et al (2015:407), "*grand theory is progressive and legitimate when developed through the elaboration of mid-range theories..., in a way that expands and enriches the overarching theory rather than restricting it via ad hoc stipulations"*. They further add that grand theory and mid-range theory are complementary with the potential to inform and integrate both inductive and deductive positions. Literature reveals that transfer pricing practices are human based, with exploitative tendencies, and are coupled with hypocritical and impression management disposition by the economic actors (Sikka & Willmott, 2010; Jonge, 2012).

2.5.2 Mid-Range Theory: Hypocrisy and Impression Management

Mid-range theories are those theories that are intermediate or related to the preliminary working propositions and all inclusive assumptions within a master conceptual plan (Vidal et al, 2015:407). Hypocrisy and impression management were applied as the mid-range theories. In a bid to reduce tax, MNEs are believed to be presenting an impression that does not depict the true status of the organisation. Companies faced with norms conflicting with the conditions required for efficient action, will come up with two sets of structures and ideologies; one for internal use and one for displaying to the outside world (Brunsson, 1993:4). This is referred to as hypocrisy

because the image portrayed to the outside world contradicts with the inner life of the enterprise (Williamson, 2013:89; Brunsson, 1993:4).

Brunsson (1982:34) stressed that if the actors are sceptic about the success of a proposed action they are less willing to embark on it. This also finds expression in Hooghiemstra (2000) who observes that organisations faced with public pressure, for instance failure to meet tax obligations or negative publicity, can react by adopting four potential strategies:

(1) Notify stakeholders about the plans of the company to improve social performance;
(2) Try to influence stakeholders' perception concerning certain negative events, but without changing actual behaviour;
(3) Distract attention away from the legitimacy; or
(4) Try to influence external or stakeholders' expectations about its behaviour.

A look at the above strategies exhibits impression management and hypocrisy (Elsbach and Sutton, 1992). This behaviour cannot be separated from the self-serving behaviour of MNEs that practice corporate social responsibility by constructing roads and clinics while aggressively avoiding tax. This kind of behaviour is explained by Bolino (1999) who questions whether such organisations are good soldiers or good actors. Bolino (1999) stresses that the decisions and actions by some companies are meant to enhance their images and not what they portray to be corporate citizens. This was echoed by Elsbach and Sutton (1992) who argue that companies use impression management devices to depict structures and actions that grant them support from stakeholders even when their core practices conflict with those desired. The two condemn behaviour by errant social actors who seek endorsement by adopting designs that divert attention from controversial core activities that may be unacceptable.

Whether the quest to protect reputation and legitimacy can be balanced is also challenged by Brunsson (2007:9) when he rightly argues that legitimacy is sometimes created by decisions that contradict actions for instance when decisions are made without implementation and without having any positive practical effect; a behaviour which may be regarded as being hypocritical. Whether both parties, taxpayers (MNEs) and tax authorities, make decisions that conform to their actions remains a question to be answered. However, Elsbach and Sutton (1992) reveal that

a company's legitimacy is sanctioned by both internal and external stakeholders, and if major stakeholders are dissatisfied with a company's decisions or actions, they may withdraw endorsements of organisational operations. The hypocritical state of affairs can also be witnessed by the use of tax havens by MNEs whereby the MNEs say one thing yet there is actually another reality (Brunsson, 1993:4).

Brunsson (1982:30) holds that making a best choice given a specific problem, and options available is also dependent on the information available. He stresses the dangers of either insufficient or too much information. This is critical especially when considering the Zimbabwean environment where new tax laws or transfer pricing laws have been introduced. The question that then follows would be: Do the taxpayers have enough information regarding the new rules? In the case of transfer pricing rules, if the legislation is, for example, not clear on the penalties or rewards that come with non-compliance or compliance then that may cause challenges especially when the tax authority tries to enforce transfer pricing adjustments or penalties on taxpayers (Maya, 2015:25).

Brunsson (1982:30) highlights that sometimes unfavourable information is suppressed in rational decision-making which is also a possibility with taxpayers because as rational players they would make choices that guard their interests. Batrancea et al (2012) buttress this by saying that taxpayers have four basic rules of compliance and that they mostly fail at rule one which is reporting the real tax base to the tax authorities. Transfer pricing abuse is among the many financial reporting shenanigans that can be found in a tax audit, for example hiding income in low tax countries (Nor, Ahmad & Saleh, 2010).

Sections 2.5.3 to 2.5.4 explore the practice theory, as it focuses on compliance to transfer pricing rules as per the rational framework.

2.5.3 Practice Theory: Rationality Theory

Practice theory is a theory of how social groups (taxpayers, tax authorities) with their diverse motives and intentions manipulate their position in relation to social phenomena (Rouse, 2007). The formal rationality theory by Weber (1968) is employed as the central theory to solve the

transfer pricing puzzle. Weber (1968) describes formal rationality as the decision-making that follows rules, regulations and laws without regard for human values. He stresses that it is institutionalised in bureaucratic structures and capitalist ideologies where profits are the main focus. This reasoning unravels the possible behaviour of taxpayers juxtaposed with those of tax authorities. Rational views indicate logic and "rule-based representations" (Goodman et al, 2008:110).

However, Brunsson (1982:33) argues that rationality is massaging rules in order to get the best possible outcomes. In formal logic, therefore, the outcome follows a clear pathway and line of reasoning: the outcomes might be immaterial: for good or bad. Rationality, therefore, has many faces as this review argues further. Therefore, the decision-making process of taxpayers and the revenue authorities sets the criteria for a rational decision. A rational decision is defined as the process of determining what options are available and then choosing the most preferred (Levin & Milgrom, 2004). Rationality theory assumes that the players will always seek to take the option that gives them an advantage (Scott, 2000:3).

The rationality theory is deployed towards an inquiry into the taxpayer behaviour as well as reactions that tax authorities can take to counter the avoidance tendencies of taxpayers. It captures the human dimensions in transfer pricing decision-making processes which are neglected in existing theory (Li, 2005:47). Rationality theory involves making decisions where there is at least a choice/two options (Brunsson, 1982:29). Some of the literature on rationality theory focussed on individuals, and yet, the behaviour of companies such as MNEs is a representation of aggregated behaviours of individuals within the organisation and has not been considered. Brunsson (2007:3) says that like human beings, organisations are a type of individual who are even referred to by law as 'legal persons'. Brunsson (1982:30) likens organisations to individuals and stresses that they have similar characteristics and business concepts thereby making rationality (and irrationality) a characteristic of organisations.

Rational players are faced with choices, and therefore calculate the alternative outcomes (Scott, 2000:3). Section 1.1 of Chapter 1 has revealed that Zimbabwe moved from anti-avoidance rules to specific transfer pricing rules. What was the rationale of legislators to move from general anti-

avoidance rules to specific transfer pricing rules? The reason points towards the effectiveness of these rules. Scott (2000:4-6) says human behaviour is guided by rewards and punishments, and questions why players should choose an action that will benefit others more than themselves. Jose (2009:6) explains that the rationality concept is useful in resolving the decision-making problem. Considering the thrust of rationality theory, making rational decisions and actions comes at a cost, Jonge (2012:9) refers to it as the burden of making a rational choice. These may include identifying alternatives and weighing up their costs and benefits.

Saunders-Scott (2013) established that increased transfer pricing regulation is associated with significant compliance costs for the taxpayer. Eichfelder and Kegels (2012:18) further note that compliance costs of taxpayers are not affected by the tax law alone, but by its enforcement through the tax authorities as well. Enforcement or maximisation of the tax base by tax authorities involves costs such as audit costs. Penalties that come with non-compliance are the determining factor in taxpayer behaviour, according to Kirchler, Hoelzl and Wahl (2008:211). The same goes with the rewards for compliance, and rational economic actors do not prioritise the interests of others and are, as claimed, exploitative (Scott, 2000:6). So it goes without saying that tax authorities can decide to strengthen their tax administrative measures without considering the cost implications on the taxpayers which may stifle voluntary compliance.

Jonge (2012:9) notes that rational behaviour is a combination of three factors, namely capacity to use the right resources in order to accomplish a set goal, the ability to allocate the scarce resources in ways that provides maximum utility, and the ability of the agent to be self-regarding. Self-regarding entails serving one’s well-being, and this is a fundamental attribute of rational players (Jonge, 2012:9).

2.5.4 Transfer Pricing as an Exploitative Mechanism

Scott (2000:1) emphasizes, that people or businesses are motivated by money and making a profit, and therefore all decisions are essentially “rational” in character. Basically people or social actors calculate the possible costs and benefits of any action before deciding what to do. The decisions are said to be value-oriented, and in this case both the taxpayer and the tax authority make decisions that give them maximum payoff. Uyanik (2010) describes the visions

of tax authorities and MNEs as diametrical opposites as taxpayers seek to pay the least amount of taxes while tax authorities seek to get the most taxes. This was supported by Hai and See (2011) who described taxpayers as economic evaders who will always make decisions based on weighing the gain of successful noncompliance against the risk of being caught. Ritzer (2007:43) stresses that in formal rationality, economic actors use existing laws that predetermine the optimum methods to be applied in economic situations.

Scott (2000:3) adds that taxpayers, as social actors, will engage in deliberate calculative strategies that give them minimum tax payments while the legislators together with the tax authority will calculate measures that will effectively draw maximum tax payments from taxpayers. Rationality involves being calculative, and the rationality theory assumes taxpayers and tax authorities are rational players who seek to maximise their group profits (by minimising their tax liability) and maximise their tax base respectively (Sikka & Willmott, 2010:8). The same authors indicated that people within organisations make rational economic decisions to exploit many opportunities to ensure their after-tax global income is maximised. Rational economic decisions are therefore not value free despite the inherent logics, but are also exploitative and self-serving.

Jonge (2012:xii) stresses that because of the rational nature of actors (firms), free riders and parasites are inevitable. This means that social actors (firms) with a tendency of taking advantage of others exist and their behaviour discourages the honest/compliant firms (Ekstrom et al, 2014:56). However, Jonge (2012:257) criticises social actors who improve their situation through interaction that worsens other actors. He advocates for some kind of win-win situation which allows one to achieve one's legacy without sabotaging other actors or players. This is evident in MNEs' behaviour when they hire tax practitioners to design tax avoidance strategies that result in domestic enterprises' competitive disadvantage while also depriving governments of their national revenue (Oguttu, 2016:17). Some of the exploitative tendencies of MNEs are briefly revealed through some of their transfer pricing strategies.

Figure 1 (in section 2.4) summarised the initial theoretical understanding of extant literature. The literature (within the substantive concept of transfer pricing) is now considered towards

providing a refined conceptual framework. This will begin with an overview of the transfer pricing strategies used by MNEs followed by the authorities' reaction to exploitative rationalities.

2.6 Transfer Pricing Strategies

MNEs are economic actors with a prime objective of maximising profit. Their decisions and actions become conflicted as a result of statutory obligations to pay tax. Their compliance with rules is, however, influenced by the social and political landscapes. Globalisation has provided avenues for crafting new transfer pricing strategies/schemes that enable MNEs to avoid tax in less developed countries (Asongu, 2015:11). Dean (2014:7) argues that incorrect pricing of cross border transactions allows profit manipulation which transpires in numerous ways and for varied reasons. Oguttu (2016:13) identified a weak legal system, bureaucracy, corruption and regulatory discretion as factors that inhibit citizens' willingness to comply with tax laws which can lead to an erosion of the tax revenue. Looking at the theoretical constructs below, MNEs have to decide on the strategy that gives them the highest tax saving which includes, among others, income shifting, tax havens and debt shifting.

2.6.1 Income Shifting

"Income shifting" is the reduction of sales values of a holding company and its associates in high tax countries or inflating the price of purchases made in these countries (Uyanik, 2010; Oguttu, 2006a:140). The working definition of "Income shifting" for the purposes of this study is when associated enterprises take advantage of tax differentials to manipulate prices of transactions between themselves. According to Olibe and Rezaee (2008) the pricing of intracompany transactions affects the distribution of profits and taxable income among associated enterprises, and most often across tax jurisdictions (cross-border transactions).

An understanding of how cross-border group transfers affect taxes is important when designing a tax policy and transfer pricing regulations (Olibe & Rezaee, 2008). According to Baker (2005), virtually every MNE uses transfer pricing to shift income around the globe. Transfer pricing can have economic benefits to the companies, but is also open to abuse as companies continue to lower their group tax burden by shifting profits from high to low tax jurisdictions by inflating

expenses in the higher tax jurisdiction and income in the lower tax jurisdiction (Gupta, 2012; Adams and Drtina, 2010 & Uyanik, 2010).

Some MNEs overprice imports and under-price exports of a host country to minimise their tax liability, practices which Nitsch (2012) stresses, result in the transfer of financial resources abroad without a trace. In a case study of the Zimbabwean mining sector, substantial evidence of under/over-invoicing was found following the dominance of mining companies and weak regulation (Kwaramba et al, 2015:4).

If approximately 60% of world trade is taking place amongst MNEs as noted in Chapter 1, intragroup cross-border transactions create opportunities for MNEs to reduce their overall tax burden, by taking advantage of the differences in tax rates and regulations in the trading countries. Wang and Wang (2008) and Azemar and Corcos (2009) concur that MNEs manipulate their transfer prices in order to shift profits cross-border as transfer pricing is affected by cross-country tax differences.

Tanzi (2008) established a positive relationship between the tax rate and under-reporting of income. Several other studies reported lower tax compliance at higher tax rate levels (Ali, Fjeldstad & Sjursen, 2010; Alm, McClelland & Schulze, 1992). However, research by Blackwell (2010) found no relationship between the tax rate and tax compliance. Olibe and Rezaee (2008) found that the cross-country heterogeneity of tax rates encourages MNEs to engage in transfer pricing manipulation to reduce the corporate tax burden. So when the tax rate is high, MNEs tend to shun tax and so engage the services of tax consultants (Sikka & Willmott, 2013) to achieve their intended objectives. Jones, Temouri and Cobham (2018) found strong evidence of tax consultants being paid huge sums of money for aggressive tax avoidance strategies. In fact, Addison and Mueller (2016) declare that the big four accountancy firms are engineers of unacceptable tax avoidance strategies.

Tax differences in tax jurisdictions increase the risk of tax avoidance through transfer pricing by MNEs. According to Borkowski (1997) developing countries are highly susceptible to tax avoidance through transfer pricing and capital flight. She advocates for the elimination of tax

rate differentials as she argues that it contributes to income shifting. The following court case elaborates how income shifting is practiced as a tax avoidance strategy by MNEs.

2.6.1.1 Unilever Kenya Ltd Case

2.6.1.1.1 Facts of the Case

The appellant, Unilever Kenya Ltd (UKL), was a manufacturing company, part of the Unilever Group of companies based in the UK. UKL entered into a contract to manufacture goods for Unilever Uganda Ltd (UUL), an associated party according to Section 18 of the Kenyan Income Tax Act. UKL charged lower prices for the same goods to UUL than it charged its domestic buyers and importers.

2.6.1.1.2 Findings of the Case

In this case the Kenya Revenue Authority challenged the prices for transactions between UUL and UKL, arguing that they were not at arm's length. To the contrary, UKL proved that they applied the cost plus method (see Chapter 4) in accordance with the OECD guidelines. The Kenyan transfer pricing reforms started after the Kenya Revenue Authority lost in the Unilever transfer pricing case in 2005 (Unilever Kenya Ltd V Commissioner of Income Tax [2005] eKLR- Kenya Law Reports).

2.6.1.1.3 Analysis of the Findings

The presiding judge ruled that Section 18(3) of the Kenyan Income Tax Act was inadequate to guide the taxpayer and therefore could not be relied on to enforce transfer pricing rules. The judge added that due to the absence of clear transfer pricing rules, the taxpayer acted within its rights to apply the OECD guidelines or any other international best practice. Murphy (2012) blames the ending of the case on the weak tax system of Kenya and on its inability to uncover the associate transactions which facilitated tax avoidance.

Next is a discussion on how tax havens are used as part of MNEs' transfer pricing strategies.

2.6.2 Tax Havens

Lenssen, Bevan, Fontrodona, and Preuss (2010) indicate that defining a tax haven is not a straight forward task. The OECD (1998) describes a tax haven as a country that has no or only nominal taxes; lack of effective exchange of information; lack of transparency and no requirements for corporate activities. Whilst Christensen (2011) defines them as autonomous or semi-autonomous jurisdictions with a combination of lax regulation, low or zero taxation on income and capital of non-residents, secret banking facilities or corporate ownership and an absence of effective information exchange with the authorities of third party countries. Hearson and Brooks (2012:2) define a tax haven as a jurisdiction that creates attractive rules, systems of regulation and veils of secrecy in order to benefit non-resident individuals and companies. Just as there is no unified definition of a tax haven, there is no agreed-upon list of tax havens (GAO, 2008).

It would be unjust to talk about transfer pricing schemes without discussing low tax jurisdictions and or tax havens, as their zero or low tax rates is the reason why MNEs invest in them. According to Murphy (2012), 60% of global trade is routed via tax havens. In a study by Christian Aid (2013), findings showed that MNEs that are connected to tax havens are involved in intensive profit shifting more than those with no links. A study by Davies et al (2014) found close to zero evidence of tax avoidance if exports to tax havens are disregarded. However, a significant percentage of losses of revenue through transfer pricing emanating from exports to tax havens was evident.

In 2000, the OECD blacklisted some tax havens expecting a reduction in investor's confidence to use the tax haven and withdraw funds. However, Kudrle (2009) found no substantial impact of this blacklisting on the banking system in and out of tax havens across 38 countries. This implies continued use of tax havens impacting on international revenue flows as Matei and Pirvu (2011) emphasise the significant increase of the use of tax havens in recent years exposing companies to unfair competition.

According to Taylor and Richardson (2014), tax havens are likely to be used together with transfer pricing and thin capitalization (higher debt than equity capital) to maximize international tax avoidance opportunities. To Murphy (2012), tax havens are essentially 'secrecy jurisdictions'

that provide a deep enigma that makes it difficult to discover transfer pricing abuse. Tanzi (2000) describes tax havens as "fiscal termites", and Borkowski (1997) argues that as long as tax havens continue to exist, income shifting by MNEs will be encouraged and continue unabated. She advocates for elimination of tax differentials that contribute to misallocation of tax revenues.

Shaxson (2012) further alludes to the fact that such special taxes and incentives to foreigners to attract foreign investment often lead to round tripping. This is a technique which Shaxson (2012) describes as the dressing up of domestic capital in offshore secrecy brought back as foreign investment. Olivier and Honiball (2011) revealed that taxpayers in developed countries try to attain unwarranted treaty benefits often exploiting a tax haven.

Part of the research objectives is to examine the transfer pricing strategies used by MNEs to avoid tax. Hence, an analysis of the SABMiller case study, shall illustrate some of the strategies applied by MNEs including use of tax havens. The SABMiller case study was selected based on its relevance to this study, and was adopted from the articles by Hearson and Brooks (2012) and Padmakshan (2009).

2.6.2.1 SABMiller Case Study

The SABMiller case study demonstrates how tax avoidance through transfer pricing is perpetrated. This case was selected on the basis of its relevance to this particular study.

2.6.2.1.1 Facts of the Case Study

SABMiller is an international brewer and one of the world's biggest manufacturers of soda drinks. SABMiller has business units in more than 75 countries around the globe. Its parent company is located in London, United Kingdom (SABMiller, 2014).

2.6.2.1.2 Findings of the Case Study

SABMiller has been accused of tax dodging (avoidance) over the past few years. In one instance it was accused of undertaking transfer pricing schemes when buying intangible assets, for example patents, in its Indian branch and the Forster's brand name from Forster's Australia [a subsidiary of SABMiller] (Padmakshan, 2009).

According to a study by Hearson and Brooks (2012:8-9), on "Why SABMiller Should Stop Dodging Taxes in Africa", SABMiller had four ways of avoiding tax. These included: (1) Going Dutch (simply taking advantage of the tax system offered by the Netherlands), (2) the Swiss Role (transferring management fees from Africa); (3) trip to Mauritius (simply another tax haven) and (4) the Thinning Top (where their Ghana subsidiary got a very big loan from their Mauritius subsidiary, translating to being excessively thinly capitalized). They also reported that of the four strategies; the going Dutch and the Swiss Role were the main culprits for huge tax losses in African countries. In all these instances, Hearson and Brooks (2012:9) could not deny that SABMiller had not violated any law, but simply minimised its tax liability legally.

The Accra Brewery, a SABMiller subsidiary in Ghana, was reported to have been generating £29 million of beer yearly. However, it recorded losses in 2010 and 2011 and only paid corporation tax in one of the four years between 2007 and 2010. A small retailer of SABMiller's Club beer in Ghana with £220 in profit monthly paid more income tax than its supplier, SABMiller's subsidiary in Accra, over a two-year period. This demonstrates that something was amiss. The major problem that Ghana had was it signed a double taxation agreement with the Netherlands (a low tax jurisdiction), leaving the taxpayer, SABMiller with the motivation to avoid tax (Hearson & Brooks, 2012:24). The ActionAid report estimates a loss amounting to £10 million per year to Africa as a consequence of this agreement (Hearson & Brooks, 2012:24).

2.6.2.1.3 Analysis of the Findings

SABMiller was avoiding tax by means of various strategies which included the use of tax havens, taking advantage of weak tax systems and thin capitalization. This exposed Africa to massive revenue losses which could have developed the poor in Africa.

The outcome of the above two cases (Unilever and SABMiller) shows the diametric relationship between the taxpayer and the taxman, as well as the importance of effective tax laws and strong tax systems.

The questions that could arise from the above cases would be:

- If the tax authority were to look at the company's transfer pricing, what would be the process (for instance audit of the taxpayer)?
- What would be the areas of concern for the tax authority (for example location of the associated enterprise - low tax country or adequacy of documentation)?
- Which transfer pricing method would likely be accepted by the tax authority and why?
- When would a primary adjustment arise (depends on the national laws)? A primary adjustment is a tax adjustment where the taxman determines that the transfer price is not at arm's length (van der Zwan, 2017).
- Could the company apply for an Advance Pricing Arrangement (depends on national laws)? An Advance Pricing Arrangement is an arrangement where the MNE can agree on an appropriate transfer pricing method in advance over a fixed period of time.

The answers to these questions help identify flaws in the various tax systems (discussed in Chapter 3 & 5) and help assess the transfer pricing rules and regulations in order to curb tax avoidance through transfer pricing.

Next is an appraisal of how MNEs manipulate prices through intra-company financing (debt shifting).

2.6.3 Debt Shifting

Debt shifting involves having an associated enterprise in a high tax jurisdiction being excessively debt financed. The excessive interest payments are channelled to an enterprise in a low tax country which attracts taxes at relatively lower rates or it may never be taxed (Oguttu, 2017:8). The researcher included debt shifting as a strategy because Schindler and Schjelderup (2013:1) found that transfer pricing and debt shifting are intertwined. They further established that the stricter regulation of debt shifting/transfer pricing potentially increases the use of transfer pricing/debt shifting and thus profit shifting. MNEs have also been accused of manipulating debt financing among their associated enterprises. Debt shifting through intra-group loans which is often associated with thin capitalization schemes has also been reported as a significant risk

which erodes the tax bases of developing countries (Oguttu, 2017:8). The OECD (2015) describes debt shifting as the easiest means of tax avoidance schemes by MNEs. Debt shifting has, however, been accused of giving MNEs a competitive advantage over domestic business.

The debt to equity restriction like the 3:1 in Zimbabwe is discouraged by paragraph 17 of the OECD report citing that MNEs can easily manipulate these by inflating equity values (OECD, 2015). Debt to equity restrictions provide fixed debt to equity ratios where the taxpayer is taxed on the excess. The rigidity of these fixed ratios has also been criticised for being unfairly applied to all sectors. Oguttu (2017) suggests applying withholding taxes on interest to minimise tax avoidance through thin capitalization. This means for all interest payments, the associated enterprise 'B' will have to withhold tax on interest before paying enterprise 'A'. However, van der Zwan (2017) argues that these withholding taxes overlap with transfer pricing. Transfer pricing adjustments on excessive interest can result in an excessive tax liability for the group.

After discovering strategies used by MNEs to erode national tax bases, it is imperative to understand how authorities react to these exploitative stances. Exploitative rationalities (Brunsson, 1993:3) are contradictory to rationality and compliance.

2.7 Authorities' Reaction to Exploitative Rationalities

The Government of Zimbabwe, through the Ministry of Finance, develops the transfer pricing legislation which is required to be enforced by the tax authority (Tapera & Majachani, 2017). Legislation contains the rules on how to calculate the transfer price and the audit system to verify compliance, penalties for non-compliance and required documentation for taxpayers to retain in order to prove their compliance.

The transfer pricing rules guided by the accepted transfer pricing guideline are meant to dampen the efforts by MNEs to avoid/evade tax (Tapera & Majachani, 2017). This results in an antagonistic situation. MNEs transfer pricing strategies can therefore influence the compilation of the legislation, and in turn the legislation affects the tax planning decisions of MNEs referred to here as transfer pricing strategies. Lohse and Riedel (2012 and 2013) indicate that the tighter

the transfer pricing rules are enforced by the respective authorities, the higher the tax compliance will be.

Given the above, it is evident that developing countries' legislators are faced with either following international guidelines or designing their own domestic system. Taxpayers too have to choose between complying and not complying while the tax authorities are faced with choosing between deterrence and persuasive measures (Ariel, 2012). This is mainly because taxpayers are considered by theorists to be rational, meaning that they aim to make decisions that improve their well-being (Thompson, 2011). Therefore, the ability of the tax authority to detect and verify transfer pricing abuse and to punish the taxpayers interweaves with the rationality theory as explained previously and as expanded upon below.

The conceptual framework developed in this study is built on the theoretical argument that theorists like Scott (2000) have raised concerning decision making by economic actors. Scott (2000) believes taxpayers are rational and make decisions that are in their favour. He emphasizes that the taxpayers' ability to achieve all they want is limited and therefore they must not only make goals but also the means to attaining those goals. For instance, if the taxpayer's goal is to minimize his tax he must also consider the alternative courses of action to achieve that goal, for example, choose to under-declare income or make use of tax havens. Legislators choose to follow the anti-avoidance rules or specific transfer pricing rules which will either be based on the OECD or UN guidelines. The rationality characteristic in social actors suggests that the goals of taxpayers are diametrically opposite to those of the tax authority. The latter reacts either by deterrent or persuasive measures while MNEs choose to comply with the rules (or not) depending on what gives each taxpayer/MNE the most benefit.

On the one hand, Ariel (2012) states that moral persuasion is premised on the idea that, appealing to a taxpayer's morals increases compliance without necessarily threatening the person with detection and punishment. On the other hand, the deterrence model is based on the view that threats of detection and punishment for non-compliance encourage tax compliance (Ho and Wong, 2008). Leviner (2008:364) and Feld and Frey (2002) argue that if tax authorities solely rely on punitive strategies or deterrence, taxpayers tend to avoid more tax.

Slemrod (2007) and Ho and Wong (2008) support deterrence while Ariel (2012) argues that moral persuasion can be counterproductive resulting in loss of state revenues. These conflicting views between the traditional economic theorists and the modern theorists may be the reason why Feld and Frey (2002) advocate for a combination of moral persuasion and deterrence. Leviner (2008:369) futher argues that a system which relies heavily on deterrence and punishment is a short-term approach and instead advocates for a more long-term approach that moves from authoritarian deterrence to "responsive regulation". "Responsive regulation" is whereby stringent controls are enforced on the errant taxpayers and allows self-regulation for the compliant taxpayers which is why Bagchi et al (1995:40) advocate for a system of penalties for non-complying taxpayers and a system of rewards for the complying ones. This proposition does, however, pose some practical problems like how will compliance be measured, the nature of the reward and the potential cost of such a system?

The issue of how tax authorities and taxpayers react is explained by Kirchler et al's (2008:211) slippery slope framework which is premised on two climates; the antagonistic (where tax authorities view taxpayers as robbers always wanting to evade) and the synergistic (a service-client relationship in which trust exists). This framework is based on the assertion that tax compliance and tax payments can be increased by either increasing trust in tax authorities or increasing the deterrence power of tax authorities (Kirchler et al, 2008).

Kirchler et al (2008:212) define the power of authorities as the taxpayers' perception of the tax authorities' ability to detect and punish errant taxpayers. This is similar to the capacity issues of tax authorities, that is, their ability to detect transfer pricing abuse and their authority to punish delinquent taxpayers. Powers of authorities include controls and punishments such as audit probabilities, audit rates, fines and tax rates (Kirchler, 2008:217). However, Uyanik (2010) is of the view that the audit is limited in that it does not detect all non-compliance and it would not detect avoidance mechanisms which are or appear to be legal. Furthermore, Bagchi et al (1995:83) stress that the success of an audit depends on the tax officials' efforts and the quality of information gathered from the taxpayer and third parties.

The question that arises is how much power is vested in the tax authority to detect transfer pricing abuse, and is it enough? Oguttu (2016:13) hints that the discretionary powers often possessed by tax authorities promote corruption which also inhibits taxpayers' willingness to comply. Kirchler et al (2008:212) reveal that the power of authorities highly depends on tax legislation and the budget allocated to them by government, but is not limited to this. They further explain that capacity issues also include financial resources at the disposal of the authority, the transfer pricing knowledge levels of the officers, the experience and the skills of the staff regarding transfer pricing matters.

Brunsson (1993:2) says an organisation that fails to train its staff would be limited. Saunders-Scott (2013) found it more costly to shift profits from a country with skilled tax agents and high penalties for transfer pricing abuse than where the tax authority has limited resources. This implies that the ability of a transfer pricing regime to successfully inhibit tax avoidance through transfer pricing will depend not only on whether the tax authorities believe in deterrence or moral persuasion, but also in the power vested in them through legislation, and resources availed to them.

However, Gupta (2012) established that MNEs continue to shift income to minimise taxes even with increased governmental regulations. Therefore, the ability of Government regulations to minimise tax avoidance would be debatable considering the MNEs' capacity to hire professional tax accountants who search for, discover and craft other tax planning strategies (Sikka & Willmott, 2013) despite increased transfer pricing rules. Specific to transfer pricing, tax authorities may react, for example, by adjusting the transfer prices used by corporates (Sikka & Willmott, 2010:5). Behrens, Peralta, and Picard (2014) argue that although tax authorities can increase tax revenue collection, their interference with transfer prices may distort consumer prices and the MNEs' organisational goals. There are several ways in which authorities could react to MNEs' transfer pricing strategies either by way of moral persuasion, deterrence or a combination of both, but a tax administration system with a combination of an omniscient judge (Bagchi et al, 1995:29) and an omniscient tax agency would have been ideal to address the issues of tax avoidance. However, Bagchi et al (1995) argue that no tax authority can detect all delinquent taxpayers, hence the best is to find ways to prevent or minimise non-compliance.

In the next section, the transfer pricing conceptual framework as informed by literature review that underpins this study is discussed.

2.8 Conceptual Framework

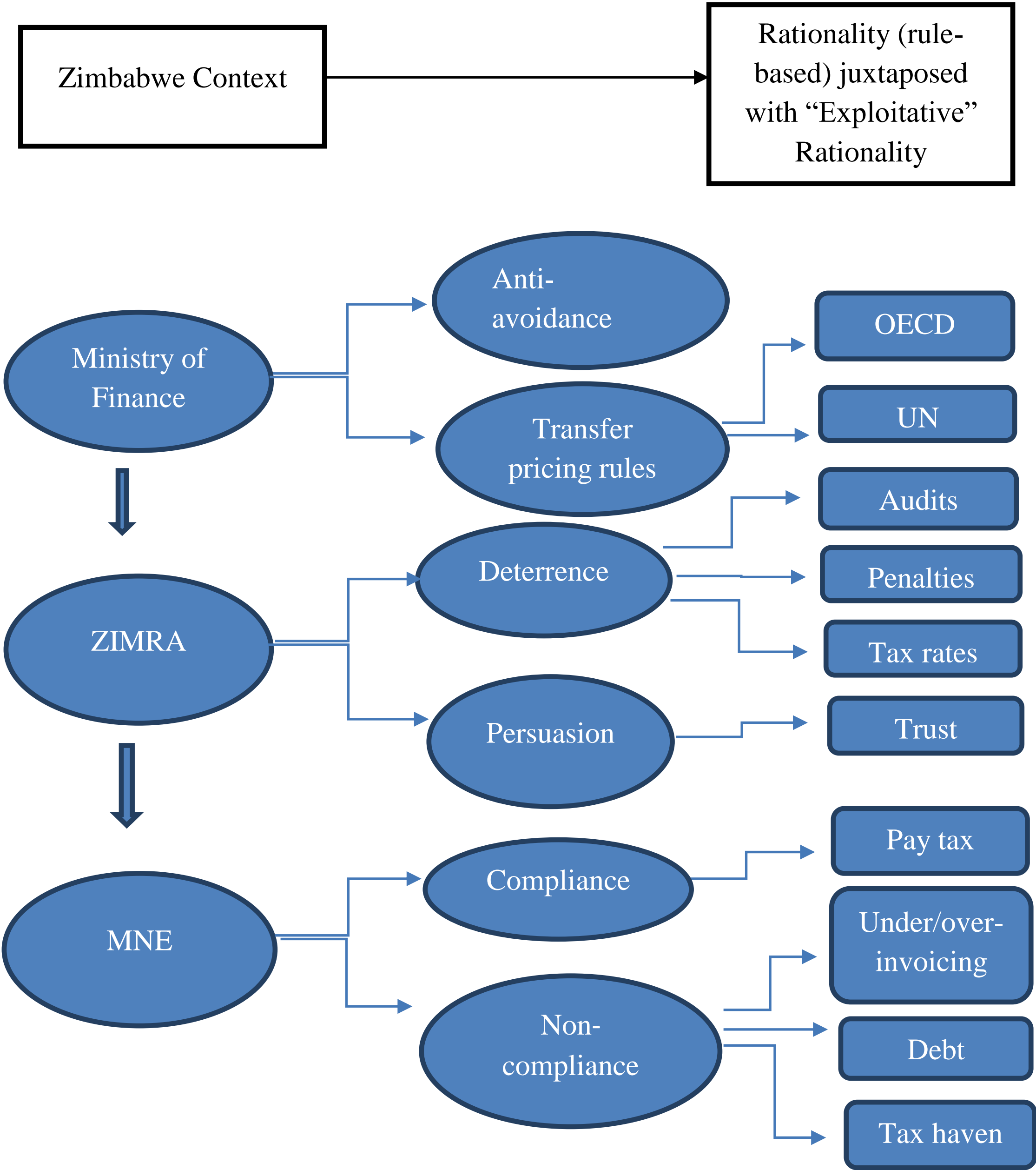
As indicated, at the initial framework discussion, the researcher derived from the overview of theories seminal to this study, a conceptual framework that draws together the contextual and the theoretical lenses as a working proposition for the advancement of the novel contribution of this study. The conceptual framework explains the different concepts as they all play a role in the effectiveness of a transfer pricing regime. It is therefore important to understand each concept and also the interaction between these. This is a summation of the theoretical arguments derived from the literature review.

The researcher considered the four conscious social players identified in literature namely: MNEs, the tax authority, the legislators and the tax consultants, as well as the options available to them to calculate their maximum utility. Figure 2 shows how legislators are faced with a decision-making dilemma which cascades down to the enforcers, and how the decisions and actions by these two will ultimately affect the tax planning activities of the MNEs. The decision-making processes of the three players (MNEs, tax authority and legislators) are well placed in the rationality elements of these economic actors. These include the legal rationalities as prescribed by the legislators and the implementation rationalities at all levels in a bid to counter the exploitative tendencies of the MNEs.

The big picture framework (Figure 1), has become modulated by the implementation and exploitative concepts that emerged from the literature review into a more refined conceptual framework (Figure 2). The aggressiveness of the transfer pricing rules affects the MNEs' decisions which will also affect the MNEs compliance or tax avoidance activities (Lohse and Riedel, 2013). It is important to note that the introduction of the rules is one thing while, their enforcement is another and that the aggressiveness of the enforcement of these rules is a function of the capacity of the tax authority. Therefore, a transfer pricing regime requires careful planning taking into account its effects which can either be positive or detrimental to the economic development of the respective country.

The economic actors are faced with various choices. For instance, an MNE can decide to choose to avoid tax through debt-shifting or use of tax havens as shown in the Figure 2. Exploitative areas are the concept that the researcher postulates and is confirmed in Chapter 7, which is the data analysis.

Figure 2: Conceptual Framework



Source: Own Compilation

Based on the above theoretical framework, it is evident that the economic actors are faced with a decision-making problem and they most likely make decisions that are in their favour (rationality theory). On the one hand, tax authorities seek to maximise their tax base, while on the other hand, taxpayers seek to minimise their tax liability. Errant taxpayers exist, and minimising tax avoidance through transfer pricing also depends on the soundness of the legislation together with the capacity of the revenue authority (Oguttu, 2016:15) as well as the attitude of the taxpayers. The rationality theory served as a seminal lens which inspired different concepts which need to be both aggregated (analysing and interpreting the data) and disaggregated throughout the research (coding). The conceptual framework showed the existence of rationality as a rules-based concept juxtaposed to the lived and livable reality of people exploiting the system for profit which has been described in this research as exploitative rationalisation of MNEs. The exploitative tendencies of MNEs influence the legal rationalisation systems and vice-versa, and the strength of these legal systems are not only dependent on the legislative frameworks but the administrative/implementation models which will be discussed further in Chapter 7.

2.9 Summary

This chapter described transfer pricing as a phenomenon by expounding on transfer pricing as a concept. An initial theoretical outline provided the grand, mid-range and practice theories that oriented the study. Impression management and hypocrisy (exploitative rationalities) were subsidiary theories that complemented the theoretical perspectives of the study. The refined conceptual framework was then postulated. Additionally, the rationality theory revealed that economic actors such as the tax authorities and the MNEs are rational in that they make self-serving decisions that give them maximum benefit. It was also postulated that rationality can become exploitative. It was also discovered that in making decisions the social actors can make decisions that are socially acceptable but contrary to their actions creating a hypocritical environment for the sake of protecting their image. There is no consensus as to whether tax authorities should use the deterrence model or moral persuasion model to promote compliance of MNEs, thus, scholars have advocated for a combination of the two.

Based on the theoretical underpinnings, a conceptual framework was constructed as presented in Section 2.8. It was discovered that apart from the existence of transfer pricing legislation, MNEs

continuously search for loopholes in the tax system, and therefore, the onus is on the respective government to relinquish powers and resources that are enough for the tax authority to detect and deter transfer pricing abuse. The chapter has also uncovered some transfer pricing strategies which MNEs apply to avoid tax. Income shifting, tax havens and debt shifting have been identified inter alia as major transfer pricing strategies used by MNEs to avoid tax. Furthermore, ineffective legislation coupled with an un-resourceful tax authority makes it easy for profit shifting to take place. These deficiencies have imposed challenges on the tax authorities especially those in the developing economies, making it difficult for them to uncover transfer pricing abuse.

Having explored the various strategies used by MNEs to avoid tax through transfer pricing, the following chapter explores the Zimbabwean transfer pricing legislation as set out in objective 2.

CHAPTER 3: ZIMBABWE's TRANSFER PRICING RULES

"A person, who never made a mistake, never tried anything new"- Albert Einstein

3.1 Introduction

The preceding chapter described transfer pricing as a tax avoidance tool, and presented the theoretical framework that guides this study. The chapter discusses the background of transfer pricing in Zimbabwe together with the transfer pricing provisions within the Zimbabwean legislation (Section 3.2) in order to effectively assess them. The chapter concludes with a summary of the transfer pricing strategies used by MNEs in Zimbabwe (Section 3.3) in order to make informed recommendations that could solve the transfer pricing problem.

3.2 Tax Authority and Legislation

In Zimbabwe, the Zimbabwe Revenue Authority (ZIMRA) is the government's arm which assesses, collects and manages revenue on its behalf. The Income Tax Act is interpreted and administered by the Commissioner-General of ZIMRA (Hore & Mangoro, 2006). Taxpayers have an obligation to abide by the existing laws, and failure to comply results in penalties and interest. Zimbabwe was one of the African nations that heavily relied on general anti-avoidance rules which awarded the Commissioner powers to dispute the taxpayer's transfer prices on the grounds that they were not at arm's length. The general anti-avoidance rules had limitations and the basis for disregarding a taxpayer's transfer prices was not clear (Section 98 of the Zimbabwean Income Tax Act (Chapter 23:06)).

The anti-avoidance provisions [Sections 98, 16q, 19 & 23 of the Income Tax Act (ITA) Chapter 23:06 (1996)] gave the Commissioner power to disregard any transaction which he/she deems to be outside arm's length provisions and has been solely for avoiding tax. Section 16q deals with thin capitalization issues, 19 and 23 deal with business beyond Zimbabwean borders. In January 2014, section 98 was split into section 98A (income splitting) and section 98B (anti-avoidance). Effective 1 January 2016, Section 98B of the Income Tax Act (Chapter 23:06) was repealed and amended by the insertion of the 35th schedule which are discussed below.

3.2.1 Section 98B of the Income Tax Act Chapter (23:06)

The Zimbabwean transfer pricing rules require that the income of any person who engages in a controlled transaction (transaction between associates) with an associated person be consistent with the arm's length principle (ALP) – that means the transfer price should not differ from that of an uncontrolled transaction (Subsection 1 of Section 98B).

According to the ITA [Chapter 23:06], "person" includes a company, body of persons corporate or unincorporate (not being a partnership), local or like authority, deceased or insolvent estate and, in relation to income the subject of a trust to which no beneficiary is entitled, the trust; while an "associate" is defined as:

> *"A person, other than an employee, acting in accordance with the directions, requests, suggestions or wishes of another person, whether or not the persons are in a business relationship and whether or not those directions, requests, suggestions or wishes are communicated to the first-mentioned person, both persons shall be treated as associates of each other for the purposes of this Act"* (Sub-section 1 of Section 2A of the ITA).

This includes near relative, trustee, company controlled by the person and partners or partnerships.

Sub-section 3 then refers taxpayers to the 35th schedule of the ITA for the determination of whether the conditions of a controlled transaction between associated persons are consistent with the ALP. Sub-section 5 places the burden of proof on the taxpayer to keep transfer pricing documentation which the Commissioner will use to establish if a transaction was at arm's length or not. Sub-section 6 informs the public that the rules may be amended by the Minister, after consultation with the Commissioner-General, by notice in a statutory instrument.

Unlike the old Section 98, which placed the burden of proof on the Commissioner to prove that a transaction by a taxpayer has been done solely for purposes of postponement, avoidance, or reduction of the liability to tax, the new rules have brought in a new dispensation. The implications are that taxpayers currently transacting with associates, trading with foreign

enterprises or planning on entering into contracts with such, must comply with the requirements of the new legislation. This also means the affected taxpayers should:

1. Apply the arm's length principle on all transactions with associated enterprises.
2. Develop a transfer pricing policy that conforms to the new legislative requirements.
3. Review and align any existing policies to the new legislation.
4. Review affected contracts and evaluate the impact of the new legislation, and ensure all intercompany transfer prices are within the arm's length range.
5. Develop and maintain relevant transfer pricing documentation (35th schedule of the ITA).

3.2.2 The 35th Schedule

This schedule prescribes the transfer pricing methods to be used, and these are borrowed from the OECD guidelines.

3.2.3 Transfer Pricing on Domestic Transactions

Paragraph 11 of the 35th schedule refers to possible transfer pricing adjustments for domestic transactions by the Commissioner which applies to the income of both parties involved in the transaction. ZELA (2016:16) revealed that the scope of the new transfer pricing laws extends to both domestic and cross-border transactions. This implies that all the enterprises (local/foreign) should comply with all the requirements for transfer pricing purposes. ZELA (2016) acknowledges that the new provisions adopt the OECD transfer pricing principles and recognise the OECD and UN transfer pricing guidelines for developing countries as relevant sources for transfer pricing issues.

3.2.4 Management Fees

Section 16 (1) (r) of the ITA (23:06) also restricts amounts deductible pertaining to administrative and management fees incurred after the commencement of trade or the production of income, to an amount not exceeding 1% of the management fees. General administration and management expenses incurred by a subsidiary or local branch of a foreign company are deductible against taxable income, subject to a formula based limit (National Budget Statement, 2017). The Financial Gazette (2016) reported that the Minerals Marketing Corporation of Zimbabwe (MMCZ) had become a conduit for transfer pricing by large mining enterprises.

Transfer pricing has been alleged to be "milking" mining revenue through the manipulation of management fees and the use of jurisdictions with favourable tax regimes as shared in The New Examiner (No date).

3.2.5 Definition of Related Party

The schedule does not define a related party but Section 2A and 2B define persons deemed to be associates and persons deemed to control a company. According to Section 2A of the Income Tax Act (Chapter 23:06) a person is deemed to be an associate:

> *"Where a person, other than an employee, acts in accordance with the directions, requests, suggestions or wishes of another person, whether or not the persons are in a business relationship and whether or not those directions, requests, suggestions or wishes are communicated to the first-mentioned person, both persons shall be treated as associates of each other for the purposes of this Act".*

This section further defined an associate to refer to a near relative of the person, a partner, a trustee of a trust, a partnership in which the person is a partner and controls at least 50% of the rights to the partnership's income or capital, and a company controlled by the person alone or with other associates.

Section 2B states that:

> *"a person is deemed to control the company if the person alone or together with associates or nominees controls the majority of the voting rights attaching to all classes of shares of the company, whether directly or indirectly or has direct or indirect influence which if exercised results in him or his associates or nominees factually controlling the company".*

3.2.6 Thin Capitalization

A thinly capitalized enterprise is one that has exclusively higher debt than equity. Zimbabwe still maintains its thin capitalization rule prescribed in Section 16 (1) (q) of the Income Tax Act. The section disallows the deduction of "any expenditure incurred by a local branch or subsidiary of a foreign company or by a local company or subsidiary of a local company, in servicing any debts

or debts contracted in connection with the production of income to the extent that such debt(s) cause the person to exceed a debt to equity ratio of 3:1" (Income Tax Act, chapter 23:06).

The section restricts debt between associated enterprises to a maximum of 3:1. The excess debt is reclassified as equity and the interest component treated as a dividend and taxed as such. Even though the section has recently been amended to only apply to foreign associates, the enforcement of this section by ZIMRA has not been as aggressive as expected (PWC, 2015). The OECD discourages the application of fixed debt-to-equity ratios in dealing with intra-group loans arguing that it is manipulated by MNEs, and that the ratios are rigid and so are unfair if applied in all sectors (OECD, 2015). Having a formulary based approach (ratio 3:1) contradicts the arm's length principle since financial assistance terms should also be determined by the arm's length principle like all the other transactions (van der Zwan, 2017). Some countries like South Africa have repealed the thin capitalization rules in order to apply the open market principle in relation to the amount being borrowed and the rate charged (Dachs, 2014). Though this is commendable, practically the application of the arm's length principle to thin capitalization may pose challenges (van der Zwan, 2017).

The National Budget Statement (2018) highlighted that due to the prevailing liquidity challenges, an increasing number of company shareholders are resorting to raising capital to finance business operations through borrowing in place of equity financing. It also indicated that companies are exceeding the Income Tax Act prescribed debt to equity ratio of 3:1 for companies that claim interest on loans as a tax deduction. Consequently, interest on the portion of the loan that results in the company exceeding the prescribed ratio is disallowed as a deduction against taxable income. This limits MNEs from avoiding tax through high interest deductions.

ZELA (2016:22) argues that authorities have fears that transfer pricing is benefiting MNEs rather than host countries and that profits are being shifted by associated enterprises from subsidiaries in Zimbabwe to parent companies domiciled in tax havens.

3.2.7 Transfer Pricing Methods and Comparables

Zimbabwe accepts the five methods contained in the OECD guidelines and allows any other method apart from the five to be used provided the five could not be reasonably applied (Finance Act, 2016). Though flexible, the use of unspecified methods, leaves room for numerous and assorted applications and methods (may include formulary apportionment) which may be difficult to reconcile. Zimbabwean legislation does not suggest any preferred methods.

Taxpayers are not required to apply more than one method to determine an arm's length price, and so the Commissioner is restricted to the method selected by the taxpayer as long as the taxpayer has acted within the confines of the law (Ernst & Young, 2016b).

Zimbabwe has no local databases with readily available company information as the availability of information of public companies is limited to published financial statements. Private companies' information is unavailable (PWC, 2015). However, the rules (35th Schedule of the Income Tax Act) state that:

> *"In the absence of information on uncontrolled transactions from the same geographic market as the controlled transaction, comparable uncontrolled transactions from other geographic markets may be accepted by the Commissioner (Paragraph 7 sub-paragraph (4). A determination of whether comparables from other geographic markets are reliable has to be made on a case-by-case basis and by reference to the extent to which they satisfy paragraph 4 of this Schedule (Paragraph 7 sub-paragraph (5)). Taxpayers using such comparables would be expected to assess the expected impact of geographic differences and other factors on the price and profitability" (Paragraph 7 sub-paragraph (6)).*

3.2.8 Advance Pricing Agreements (APAs)

An APA is an arrangement where the MNE can agree on an appropriate transfer pricing method in advance over a fixed period of time (Lohse and Riedel, 2013:8). Though Zimbabwe has entered into double tax treaties (DTTs) with 12 countries, it has no Advance Price Agreement program in place (PWC, 2015). The UN (2017) indicates that tax rulings are almost similar to APAs, but there is a subtle difference between them since a tax ruling can be applied on any tax issue, while APAs relate only to the application of transfer pricing rules. Both APAs and tax

rulings bring legal certainty by determining in advance a tax rate or tax base by considering a taxpayer's unique situation (Oguttu, 2006b).

3.2.9 Documentation Requirements

The 35th schedule does not prescribe the documentation requirements in spite of Section 98 referring taxpayers to the 35th schedule. This leaves the taxpayers with the burden of preparing something that they don't know is acceptable or not. Preparing documentation would be advantageous to the taxpayer especially in cases of dispute. While the international guidelines prescribe the preparation of three tier documentation, the local file, master file and country by country reporting (CbC), ZIMRA hasn't provided any specific documentation requirements nor documentation deadlines yet, therefore, the absence of a guide on how the documentation should be prepared is an ambiguity for both the taxpayer and the tax authority.

According to the OECD (2017) contemporaneous documentation means that the documentation would be prepared at the time of the transaction, or in any event, no later than the time of completing and filing the tax return for the fiscal year in which the transaction takes place. ZELA (2016:17) says applying the transfer pricing rules to the mining sector proves to be a challenge for ZIMRA and there is a need to make an explicit clause that makes reference to the application of transfer pricing rules in all legal documents.

The subjective nature of determining a transfer price (the taxpayer applying his commercial judgement) could lead to major tax adjustments (UN, 2013:412). To reduce the possible impact of this, the UN (2013:412) recommends that a tax authority prescribe the minimum documentation required as part of the burden of proof. The UN does, however, note that taxpayers could argue that it places a higher compliance cost burden on them.

3.2.10 Audit procedures

ZIMRA has not provided any specific audit procedures for auditing transfer pricing. Although it has conducted a few audits, no specific industry or sector has been the focus (PWC, 2015).

3.2.11 Penalties

There are no penalties specific to transfer pricing, so the general corporate tax penalties of 100% for non-compliance apply (Ernst and Young, 2016a).

3.2.12 Dispute Resolution

According to Section 62 of the Income Tax Act [Chapter 23:06], the following are the steps to be taken for resolving disputes between the taxpayer and ZIMRA:

1. Where a taxpayer is dissatisfied with decisions made or assessments raised by the Commissioner, an objection can be made by writing a letter to ZIMRA.
2. The letter must state the grounds of objection and should be submitted within 30 days of the decision or assessment.
3. The Commissioner will consider the objection and is required by law to respond within 90 days.
4. The response will be either to agree with the taxpayer or to disallow the grounds of objection.
5. Where the objection is disallowed, the client can appeal to the Fiscal Appeals Court or High Court.

The sections above have presented the transfer pricing legislative and administrative policies that exist within Zimbabwe. Zimbabwe's harsh economy exposes MNEs to a unique tax environment, while the lack of comprehensive transfer pricing related legislation in Zimbabwe grants MNEs an opportunity to avoid tax. This is buttressed by Ching-Wen and Hsiao-Chen (2010) who state that a country's tax environment is an important factor when selecting an investment location. In order to effectively assess the adequacy of Zimbabwean rules, a look at the transfer pricing strategies (used by MNEs) that it seeks to address, are considered next.

3.3 Transfer Pricing Strategies used by MNEs in Zimbabwe

The following paragraphs discuss three main transfer pricing strategies (tax havens, over/under-pricing, manipulation of legislative loopholes) identified in literature and are buttressed by some cases deemed relevant to these strategies.

3.3.1 Tax Havens

Tax havens are described as jurisdictions which do not only provide low tax rates, but also provide conducive environments for profit shifting through transfer pricing (Davies et al, 2014). ZELA (2016:21) raises concerns over the use of tax havens for tax avoidance purposes in Zimbabwe, citing some mining companies in Zimbabwe that are registered in tax havens such as the New Dawn Mine that is registered in the Cayman Islands and Zimplats that is registered in Guernsey. Cayman Islands and Guernsey are believed to be among the international list of tax havens (Jones, Temouri & Cobham, 2018). ZELA (2016:21) indicates that tax havens facilitate tax avoidance by allowing income to flow out of the country secretly and untaxed. Davies et al (2014) found 90% of tax avoidance to transfer pricing of exports to tax havens. Klassen et al (2017) emphasize how tax havens play a major role in the transfer pricing strategies of MNEs.

3.3.2 Over pricing/under pricing

A Sunday News article by Chakanyuka (2015) disclosed high transfer mis-pricing in Zimbabwe especially in the platinum mining business which was widening the trade deficit. It also reported that Zimbabwe has lost approximately $239million through export under-invoicing in the mining sector. Musarurwa (2013) reported that according to AFDB and GFI, Zimbabwe has lost $12 billion over the last three decades through over-pricing or mis-pricing of transactions. An article by Newsday (2017) reported that ZIMRA was losing sleep over transfer pricing. Econet (a MNE in Zimbabwe) was also implicated in a transfer pricing scandal through over-invoicing to its sister company in Mauritius to the amount of $300 million (Chitemba, 2017). What was intriguing in this article is that some ZIMRA top officials were also implicated in the scandal.

3.3.3 Manipulating legislative loopholes

The researcher also reviewed a court case and Zimbabwe's fiscal appeal court took a lengthy time to conclude on the only transfer pricing case before it. This case was submitted to the courts in 2014 and only finalised four years later, that is, in February 2018. This was the case of CF (Pvt) Ltd vs ZIMRA FA 22/2014. The appellant (CF) objected to the decision by ZIMRA of a tax adjustment by invoking Section 24 of the ITA and applying functional analysis. The appellant argued that ZIMRA had no right to do that as Zimbabwe had no specific transfer pricing provisions in its legislation until January 2016 (the transactions in question took place

before then), and that functional analysis was an international practice. The appellant called in evidence of two witnesses, the independent tax consultant and chief investigations officer. The engagement of the tax consultant as a witness ratifies the role played by tax professionals in the compliance decisions of taxpayers as alluded to by Sikka and Willmott (2010:7). Though the court decision was not in favour of the appellant, the argument raised by CF (Pvt) Ltd emphasises the need for effective legislative frameworks, failure of which generates conflicts and consumes resources that could be channelled towards productive sectors than spent in litigation processes. Cazacu (2017:22) also castigates uncoordinated tax administration systems arguing that they exacerbate revenue losses.

ZIMRA took the position that the two parties involved were associated enterprises, and the Commissioner was dissatisfied by their transactions which were deemed not to be at arm's length. The case ended with ZIMRA declaring that it had no obligation to prove that its opinion was correct, but rather the onus lied with the taxpayer (appellant) to show that the Commissioner's opinion was incorrect.

The case above shows that tax avoidance through transfer pricing is a possibility in Zimbabwe, and that it is highly likely that much of it goes undetected as Sikka and Haslam (2007:10) stress that developing countries are poorly equipped to detect transfer pricing abuse. The contents of the case and the arguments presented by the appellant also show the importance of a strong legislative framework which can help to minimise potential disputes, and that a functional fiscal court would also provide taxpayers with confidence in the tax and legal system.

The finality of the case enlightens the taxpayers to the realities of preparing and maintaining proper transfer pricing documentation to prevent avoidable disputes. An APA arrangement in this case would have also helped to prevent such a dispute from having to go as far as the courts. Such arrangements could save both ZIMRA and the taxpayers from avoidable costs of litigation and court procedures. The other weakness is that while the court takes at least four years to conclude on a matter, the Zimbabwean legislation (Section 36 of the ITA) requires that the taxpayer pays the additional tax prior to the passing of the court judgement.

3.4 Summary

The background to Zimbabwe's tax laws relevant to transfer pricing were reviewed in this chapter. An overview of the transfer pricing strategies used by MNEs in Zimbabwe were also discussed to provide context to the study before the Zimbabwean transfer pricing rules are considered in relation to the international transfer pricing guidelines that will be presented in the next chapter.

CHAPTER 4: INTERNATIONAL GUIDELINES

"The government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it, and if it stops moving, subsidise it" - Ronald Reagan

4.1 Introduction

The previous chapter presented Zimbabwe's existing transfer pricing rules in order to compare them against the international transfer pricing guidelines that are discussed in this chapter. The intention of this chapter is to provide a review of the transfer pricing phenomenon as depicted in the literature particularly the prescriptions of international transfer pricing guidelines. The chapter focuses on the OECD and the UN that have taken a leading role in developing the guiding principles, and non-binding mechanisms for transfer pricing at an international level. Evaluating the OECD and UN guidelines addresses objective 1 which focuses on the transfer pricing methods in a bid to recommend what would be appropriate for Zimbabwe. The OECD's Arm's Length principle as well as how to achieve the arm's length price using the five methods as prescribed by the OECD are discussed in Section 4.2.1, while the specific transfer pricing methods are discussed in Section 4.3. This chapter also evaluates the United Nations transfer pricing guidelines in Section 4.4. A comparative analysis of the two sets of transfer pricing guideline is conducted to inform policy in Section 4.5.

4.2 The OECD Principles

The OECD's work on transfer pricing was first published in 1963, updated in 1979 and another model was issued in 1992. In 1995 transfer pricing guidelines were approved, and were progressively updated and major changes were done in 2010 (Lehner, No date). Reviews of these guidelines have been done since 2012 and were supplemented by other reports such as the BEPS report of 2016. The latest revision of these guidelines was done in 2017 (OECD, 2017). It is apparent that transfer pricing continues to be a global issue and the measures and guidelines intended to mitigate tax avoidance through transfer pricing are continuously being revised and progressively changing.

The OECD’s ALP has been accepted worldwide (by both OECD and non-OECD countries) (UN, 2013:14). Despite this wide adoption, it has been critiqued by Martin Hearson, the tax analyst of Action Aid (International tax review, 2011). He argues that the OECD transfer pricing rules are too complicated to ever serve the best interests of Africa and that these countries need more flexibility and guidance in order to apply the rules. Furthermore, some castigate the OECD principles as unworkable for developing countries (Durst, 2015b). The UN has also developed transfer pricing guidelines for developing economies (UN, 2017), but they are also primarily based on the OECD guidelines which follow the arm’s length principle. The following section focuses on the Arm’s Length Principle (ALP) to examine the extent to which it is applicable in Zimbabwe.

4.2.1 The Arm’s Length Principle (ALP)

When independent enterprises transact with each other, usually the conditions for the sale, including the price, are determined by the market forces (demand and supply). When associated enterprises transact the conditions and price of the transaction may not be a reflection of the market forces, thereby distorting the equilibrium and probably resulting in unfair competitive advantage against other stakeholders such as domestic enterprises. As such a technique called the Arm’s Length Principle has been adopted to address transfer pricing disputes and protect national tax bases (Keuschnigg and Devereux, 2012). It is used to reflect a price that would have been set between independent enterprises in an uncontrolled transaction (World Bank, 2013). The OECD (2010a:32) stresses that transactions between associated enterprises may not always deviate from the market forces, as some of these enterprises have some degree of autonomy which allows them to negotiate with each other as if they were independent enterprises. However, evidence has shown that most of these MNE transactions are priced mainly for tax reasons thereby granting a tax advantage to the group (Fuest et al, 2013).

Paragraph 1 of Article 9 of the OECD Model provides that:

> *“Where conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions,*

have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

Article 9 of the OECD Model clearly advocates for the adjustment of profits of associated enterprises to reflect profits that would have accrued if the transaction was between independent enterprises for tax purposes. The adjustment is on the assumption that the MNEs are separate enterprises rather than inseparable parts of a unified corporate (OECD, 2010a:33).

OECD countries and other non-OECD countries with transfer pricing rules have unanimously adopted the Arm's Length Principle arguing that it promotes international trade and foreign investment as it seeks to eradicate the competitive disadvantages that non-arm's length prices would pose and therefore leaving both associated and independent enterprises at a more equal standing (OECD, 2010a:34; Adams & Drtina, 2010; Li, 2006). According to Adams and Drtina (2010), the ALP creates a benchmark that firms can usually fulfil by adopting the market price as their price. The ALP has also proved to be useful in many cases and was first adopted by the United States in the early 1920s and transfer pricing guidelines were issued in 1968 (Hammer, 1996). Nonetheless, with all these advantages, ALP still has its own flaws which are explained next. In the next section the study looks at the criticisms of the OECD and its Base Erosion and Profit Shifting (BEPS) Action Plan.

4.2.2 Criticism of the OECD, the ALP and the BEPS Action Plan

Although the ALP is defended by the OECD, the OECD admits that the ALP may be difficult to apply since associated enterprises may engage in transactions that do not exist between independent enterprises, making it difficult for both tax authorities and taxpayers to obtain data (OECD, 2010a:35). Durst (2015b:18) also criticises the "arm's length" transfer pricing approach which requires that transfer pricing transactions reflect "comparable" prices. Durst (2015b:18) argues that it is not feasible for multinationals to operate businesses that are not integrated. For example, where manufacturers and distributors are separately owned, such business could not compete with an integrated multinational. So the "comparable" prices simply do not exist because all the players in the market are integrated and there is no trade between independent enterprises. The World Bank (2013:17) also stressed that the ALP's heavy dependence on comparable data is disadvantageous and can increase the tax authority's administrative burden

and compliance burden for the taxpayer. Bhat (2009:14) further notes that if comparable uncontrolled prices really existed, no MNE would choose transfer pricing manipulation.

Conversely, Oguttu (2006b:468) argues that the ALP yields good results and rejecting it would destabilise international consensus and promote double taxation. Oguttu (2016:9) criticises the OECD for failing to acknowledge that their member countries had dealings with tax havens (see section 3.3.1 for more details on tax havens) and that the OECD was benefiting from such transactions. She further criticises the OECD for promoting the interests of the developed countries and not developing countries as the developing countries were never consulted in the development of the 15-point BEPS Action Plan. She blames the BEPS Action plan for failing to address the specific needs of developing countries and magnifying global inequality. Baker (2013) describes BEPS as an agenda launched by the OECD in favour of the OECD member states.

Oguttu (2016) criticised the OECD for failing to address the elementary deep-seated international tax reforms that are critical in addressing BEPS such as disparities in residence and source based tax systems. Oguttu (2016:20) chastises the OECD for giving nations unrealistic deadlines (two-year period) to achieve the BEPS 15-point Action plan without considering the legislative, economic and administrative challenges faced by developing countries.

From the literature, it appears that the arm's length principle championed by the OECD is the gold standard of the moment. However, certain commentators argue that it is flawed by the treatment of MNEs' interrelated transactions as if they are unrelated. Further, they state that the OECD's BEPS Action Plan fails to capture the specific needs of developing tax jurisdictions – such as Zimbabwe.

The following is an examination of the five transfer pricing methods delineated by the OECD.

4.3 Transfer Pricing Methods

There are two broad categories of determining the ALP, namely the traditional transaction methods category and the transactional profit methods category (OECD, 2010a:59). The traditional transaction methods are more traditional and the transfer price is calculated and

analysed for each transaction separately. Even though they are more objective, they are limited by the complexities of business transactions or unavailability of the required information for an objective comparison (OECD, 2017:98). The OECD lists five transfer pricing methods for computing the arm's length based prices. These are Comparable Uncontrolled Price (CUP), Resale Price Method (RPM), Transactional Net Margin Method (TNMM), Profit Split Method (PSM) and Cost Plus Method (CPM). These methods each have their own limitations depending on the nature of the transactions and circumstances surrounding them. As a result, transactional profit methods were created, but they call for a detailed functional analysis (Loncar, Zrinka and Mves, 2011). The OECD previously favoured the traditional transactional methods (CUP, RPM, and CPM) and treats the transactional profit methods (TNMM, PSM) as the last resort (OECD, 1995; Silberztein, 2009). However, Silberztein (2009) argues that "No method is perfect, and the inherent risks for disputes are not hard to spot".

The two categories are explained in more detail in the following section.

4.3.1 Traditional Transaction Methods

Developing countries have argued that these traditional methods are more supportive of developed countries (Oguttu, 2016). The traditional transaction methods that rely most on comparable data include the CUP, RPM and the CPM (OECD, 2017:101). Each of these methods shall be discussed below.

4.3.1.1 Comparable Uncontrolled Price (CUP) Method

The CUP method compares prices of goods or services rendered in controlled transactions (between associated enterprises) with the prices of goods or services of a similar nature in uncontrolled transactions (OECD, 2010a:63). However, to ascertain the price of similar products under the same circumstances in an uncontrolled transaction the comparison maybe a challenge (OECD, 2010a:63; PWC, 2009:25). The CUP method is suitable where an independent enterprise sells the same product under similar conditions as between two associated enterprises (OECD, 2010a:64). Furthermore, if differences exist between the controlled and uncontrolled transactions, it has to be determined whether the differences have a material effect on the price and if so reasonably accurate adjustments have to be made to eliminate that effect. However, the

OECD (2010a) argued that an adjustment may influence reliability of this method making its applicability and the results questionable, but these difficulties must not disqualify the application of the method. Oguttu (2006b:464) added that finding such similar transactions with no material differences between independent enterprises is not possible in normal business transactions, as there are bound to be variations for instance in quantity.

The UN (2013:197) separates comparables into internal and external comparables. Internal comparables are transactions between the tested associated party and an uncontrolled/independent party. External comparables are transactions between two enterprises neither of which is an associate enterprise. The UN model states that differences, for example, in delivery and insurance costs as well as geographical factors such as, differences in inflation, also have to be adjusted for. However, it may be impossible to make reasonable accurate adjustments for unique intangible assets (e.g. trademarks) and where there are fundamental differences in the products using the CUP method (UN, 2013:200).

According to the UN (2013:201) the CUP method is a two-sided analysis as the price reflects the price agreed between two unrelated enterprises. It does not specify who of the related enterprises involved in the controlled transaction must be treated as the tested party. The CUP method is less susceptible to differences in non-transfer pricing factors. The UN further highlights that the main weakness of CUP is in the difficulty of finding comparable uncontrolled transactions. This has also been echoed by PWC (2011) which observed that this is a big challenge especially for developing economies. In cases where the CUP may not be applicable, the resale price method may be used.

4.3.1.2 Resale Price Method (RPM)

The resale price is the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise (OECD, 2010a:65). The Resale Price Method (RPM) compares the captive distributor’s gross margin on the product sourced from associated enterprises with the gross margin that the same reseller earns on items sourced in a comparable uncontrolled transaction (internal comparable) (OECD, 2010a:65; King, 2009; PWC, 2009:26).

It is most useful for buy and sell operations (OECD, 2010a:65; Silberztein, 2009). The RPM also depends on comparability of functions performed just like the CUP method. However, compared to the CUP method, fewer adjustments are normally needed to account for product differences as the differences are less likely to be material on the profit margin than price (OECD, 2010a:66). According to the OECD (2010a:68), a RPM is more accurate where it is realised within a short time of the reseller's purchase of the goods. Tax authorities are encouraged to look beyond the resale price in cases where there is a chain distribution through an intermediate company, as well as consider whether the reseller has exclusive rights to resell the goods (OECD, 2010a:69).

According to the UN (2013:205), the transfer price for the sale of products between the associated enterprises can be described by the formula:

$$TP = RSP \times (1 - GPM)$$

Where:

TP = the Transfer Price of a product sold between a sales company and a related company.

RSP = the Resale Price at which the product is sold by a sales company to unrelated customers.

GPM = the Gross Profit Margin that a specific sales company must earn.

Accounting consistency (for example inventory valuation method) is critical in applying the RPM method. The UN (2017) further states that there are two ways of determining the gross profit margin namely; the transactional and functional comparisons. The UN (2017) also noted that the transactional comparisons are more likely to achieve broad product and accounting consistency than the functional comparisons, though the RPM method is more typically applied on a functional than a transactional basis.

The RPM is based on the market price, and in cases where demand is inelastic, the RPM method may be more reliable. The RPM method is most suitable for the manufacturing industry, where the CUP method is unreliable. However, the reliability of RPM method can be affected by factors such as composition of "cost of goods sold". Finding comparable data on gross margins may be difficult because of accounting inconsistencies (UN, 2013:211). Oguttu (2006b:464)

emphasizes that it may be difficult to compare the cost structures and functions between enterprises as these usually differ from firm to firm.

Loncar et al (2011) notes that the RPM method is one sided, in that only the distributor's gross profit margin is controlled whereas the manufacturer's is not adjusted nor analysed. According to Eden (2009:606) the implementation of RPM method tends to overestimate the transfer price assigning the total unallocated profits to the manufacturer. Cools, Emmanuel and Jorissen (2008) added that one-sided methods are not always the most appropriate to use in transfer pricing analysis. The following is a discussion on the Cost Plus Method.

4.3.1.3 Cost Plus Method (CPM)

The Cost Plus Method (CPM) starts from the costs incurred by the supplier in a controlled transaction. Thereafter an appropriate mark-up is then added to these costs (OECD, 2010a:71; Silberztein, 2009; Oguttu, 2006b:464). It compares the gross profit mark-up earned by the tested party for manufacturing the product or providing the service to the gross profit mark-ups earned by comparable companies (UN, 2013:216) and is most useful in the manufacturing and service industries. It is almost similar to the RPM method concept, but the comparisons are on gross profit mark-ups rather than gross profit margins.

Contrary to the RPM method, CPM presents the risk to underestimate the transfer price and all unallocated profits are given to the buyer (Eden 2009:607). Valid comparison is only possible when the cost definitions are identical and this poses a challenge as there may be no clear link between the costs incurred and the market price (OECD, 2010a:72). According to Loncar et al (2011) both the cost plus and RPM methods operate under the presumption that there is a competitive market ensuring an equal level of similar enterprises' gross profit.

With the CPM, the tested party is the related party manufacturer/service provider and focus is on the gross profit mark-up in costs incurred by the supplier of property/service. With this method, the historical cost basis is normally used to determine the costs and one can use either budgeted or actual cost, though the method is based on actual cost (UN, 2013:222-223).

The UN provides three classes of costs namely; direct, indirect and operating expenses. CPM is a profit margin and a net margin analysis would take operating expenses into consideration. In such instances, suitable adjustments need to be made (UN, 2013:218). CPM is based on internal costs for which information is readily available. However, since the method is based on actual cost, there may be no incentive for the controlled manufacturer to control costs (UN, 2013:223).

Furthermore, of all the above mentioned methods, if the differences between the controlled and the uncontrolled transactions to be compared are material, reasonable adjustments must be made (OECD, 2010a). Apparently, transactional methods are affected mainly by cost structures and functions performed, hence the OECD came up with transactional profit methods that are less affected by these factors and these are the TNMM and the TPSM.

4.3.2 Transactional Profit Methods (TPM)

The TPM examine the profits that arise from particular controlled transactions (OECD, 2010a:77). According to the OECD there is the Transactional Net Margin Method (TNMM) and the Transactional Profit Split Method (TPSM). Unlike traditional transaction methods, the analysis of which is based on particular comparable uncontrolled transaction involving similar products, here the analysis is based on the net return [Earnings Before Interest and Taxes, (EBIT)]. These methods can also be applied in situations involving valuable intangible assets. They are very useful especially where traditional transactions methods have proved to be unreliable (for instance when comparables are not available) (Cools et al, 2008).

4.3.2.1 Transactional Net Margin Method (TNMM)

The Transactional Net Margin Method (TNMM) examines the net profit relative to an appropriate base (such as costs, sales and assets) that a taxpayer realises from a controlled transaction (OECD, 2010a:77). Unlike traditional transaction methods, TNMM is based on the net profit (Loncar et al, 2011) and is less affected by transactional differences than is the case with price as used in the CUP method (OECD, 2010a:78). In cases where one of the parties is complex, TNMM is advantageous in that it focuses on the tested party, and thus does not require the books and records of all parties (OECD, 2010a:79).

According to OECD (2010b) TNMM can be applied by weighting the net profit to, but not limited to, sales, costs or assets, number of employees and distance. It is commonly used by taxpayers and is easier to find comparables with this method (UN, 2013:226). TNMM is also used by tax authorities to identify companies for audit by analysing their net profit margins, and it is also used to confirm the results of traditional transaction methods (UN, 2013:249). With TNMM less complex functional analysis is necessary, and its results are similar to the results of a modified RPM or CPM (UN, 2013:245).

Factors such as threat of new entrants, substitutes and management efficiency may influence the net profit indicator, thus making accuracy and reliability of determination of the arm's length net profit indicators difficult (OECD, 2010a:82). For comparability purposes, measurement consistency is very important and differences in treatment for expenses like depreciation and provisions need to be adjusted (OECD, 2010a:83). Except in exceptional cases, non-operating expenses such as income taxes must be excluded from calculating the net profit indicator. In addition, it is one-sided in nature (OECD, 2010a:80).

According to Durst (2015b:16) this method is less reliable than the first three of the four methods above because of its use of net margins which are sensitive to the cost structures of companies. The other alternative TPM that can be used is the TPSM.

4.3.2.2 Transactional Profit Split Method (TPSM)

The TPSM seeks to eliminate the effect on profits of special conditions in a controlled transaction. TPSM is a two-sided approach (OECD, 2010a:94) which splits the combined profits between associated enterprises on an economically valid basis to reflect profits that would have been made in an arm's length transaction (OECD, 2010a:93). Loncar et al (2011) added that the TPSM is not one sided as the evaluation is done bilaterally and therefore there is no danger of underestimation.

Though it involves the splitting of profits, it is not limited to the contribution analysis approach and the residual profit split approach (OECD, 2010a:96). Under the contribution analysis method, the combined operating profit before interest is divided between the companies on the

basis of their relative contribution to the combined gross profit. While under the residual profit split method, each of the companies is assigned a portion of the profit according to the basic function it performs. The residual analysis is normally applied to cases where both sides of the controlled transaction contribute valuable intangible property to the transaction (UN, 2013:251). In practice the residual profit split method is used more than the contribution analysis method (UN, 2013:253).

The residual profit or loss is then allocated between the companies on the basis of their economic contribution in relation to the amount to be allocated (OECD, 2010a:97). In addition, accounting standards must be selected in advance of applying the method in order to achieve a common accounting basis.

TPSM is more useful where the one-sided methods are inappropriate, and offers flexibility considering the unique features of the associated enterprises (OECD, 2010b; UN 2013:254). Access to information from foreign affiliates maybe a challenge for tax authorities and MNEs, making the applicability of TPSM difficult. Furthermore, it may also be difficult to calculate combined revenue and identify the appropriate operating expenses for a certain transaction when determining the operating profit (OECD, 2010a:95; UN, 2013:253).

However, Durst (2015b) argues that the "comparable" prices do not exist because all the players in the market are integrated and there is no trade between independent enterprises. Silberztein (2009) argues that there is no perfect method and the inherent risks for disputes are evident. In addition, economists (such as King, 2009) have fervently criticised the above methods, arguing that they are not based on sound economic principles. The future of the arm's length principle remains a mystery with mounting opposition from various sectors and Tax Justice Network (TJN) (2017) having predicted its end with a report entitled "Beginning of the end for the ALP".

The following table provides a closer look at the five transfer pricing arm's length methods. It is important to consider the methods that have been largely accepted and have dominated the globe (Heggmair, Boehlke and Ali-Nakyea, 2013:2). These methods are presented in Table 2 below.

Table 2: Summary of Transfer Pricing Methods

Method	Description	Where it is used	Advantages	Criticisms
CUP	Compares intra-group prices to comparable uncontrolled transactions (OECD, 2010b).	Suitable where an independent enterprise sells the same product under similar conditions as between two associated enterprises (OECD, 2010a:64).	Direct and reliable (OECD, 2010b).	Impossible where there is a lack of comparable data (PWC, 2011). Comparables are a challenge especially in developing countries.
RPM	Compares intra-group gross margin to resale margin in comparable uncontrolled transactions (OECD, 2010b).	Most suitable for the distributors and resellers or manufacturing industry (OECD, 2010a).	Fewer adjustments are normally needed to account for product differences as the differences are less likely to be material on profit margin than on price (OECD, 2010a:66).	It is a one-sided method. Cools et al (2008) argues that these are not always the most appropriate methods to use in transfer pricing analysis.
CPM	Compares mark-up costs of the controlled party to the mark-up earned on comparable uncontrolled transactions (UN, 2013:216).	Is most useful in the manufacturing and service industries (UN, 2013:216).	Simple and easy to apply. It is based on internal costs and information is readily available (UN, 2013).	The method is based on actual cost. There may be no incentive for the controlled manufacturer to control costs (UN, 2013:223).
TNMM	Examines the net profit relative to an appropriate base (such as costs, sales and assets) that a taxpayer realises from a controlled transaction (OECD, 2010a:77).	Commonly applied in transactions that involve provision of services between associated enterprises (OECD, 2010a).	Most used method by taxpayers and is easier to find comparables with this method. TNMM is also used by tax authorities to identify companies for audit by analysing their net profit margins (UN, 2013:226).	Is a one-sided method and is less reliable than the first 3 methods above because of its use of net margins which are sensitive to the cost structures of companies [(SARS, Practice Note 7 (1999)].
TPSM	Splits the profits between associated companies to match arm's length price.	More useful where the one-sided methods are inappropriate (OECD, 2010b).	No danger of underestimation as TPSM is a two-sided method (Loncar et al, 2011), Offers flexibility considering the unique features of the associated enterprises (OECD, 2010b).	Access to information from foreign affiliates maybe a challenge for tax authorities, making the applicability of TPSM difficult (OECD, 2010b).

Source: Own Compilation

The next section provides an examination of the United Nations transfer pricing guidelines in a bid to establish whether they are appropriate for Zimbabwe.

4.4 The United Nations Transfer Pricing Guidelines

The United Nations (UN) guidelines, launched in 2013, guide nations on how to set up transfer pricing policies from scratch (UN, 2013). This is mainly presented in the capacity building chapter (Chapter 4) of the guidelines. These guidelines also review the transfer pricing systems in the BRICS countries. Even though the UN transfer pricing guidelines are specifically for the developing countries, the guidelines retain most of the OECD fundamental principles. The question is - Are there any significant differences between the two sets of guidelines? If so, why have most developing countries adopted the OECD guidelines? Though efforts by the UN are vital, their adequacy still remains a mystery. Like any other model the ALP has its own flaws, and whether the UN has to reinvent the wheel or not is also a question for debate. Baker and Mckenzie (2006) report that developing countries refute the importation of OECD guidelines into the UN, arguing that the OECD is a reflection of interests that serve the developed world.

The next section explores the fundamental differences between the OECD and the UN guidelines.

4.5 Comparison of OECD guidelines and UN guidelines on Transfer Pricing

A detailed account of the differences between the two will provide insight into the applicability of the guidelines to Zimbabwe. The document review has revealed that the type of tax systems, and the nature of the user economies are the main differences between the OECD and the UN guidelines. The similarities between the OECD and the UN are discussed in this section as well.

4.5.1 Differences between OECD and UN guidelines

4.5.1.1 Tax system (Source/Resident based)

The Zimbabwean tax system is source based (Tapera & Majachani, 2017). The OECD guidelines represent the interests of the resident country whereas the UN guidelines give more attention to source jurisdiction. A source jurisdiction taxes all income earned within its borders. For instance, a South African citizen temporarily residing in Zimbabwe and who sells a house in Zimbabwe

will pay taxes to the Zimbabwean Government on this sale. A resident based jurisdiction will tax all domestic and foreign income earned by a "resident". A country cannot take a unilateral approach to the OECD's BEPS action points without considering the global environment and other countries' responses to the concerns. So OECD member states need to reach consensus on measures to address BEPS and clear guidance needs to be provided before policies can be considered. Therefore, a country' alignment to OECD guidelines is an important factor for consideration

4.5.1.2 Beneficiaries (Developed/Developing Countries)

The OECD guidelines are mainly for developed countries while the UN model convention is more devoted to developing countries' needs (Oguttu, 2016:25). Databases relied on in transfer pricing analyses tend to focus on developed country data that may not be relevant to developing country markets (at least without resource and information-intensive adjustments), and in any event are usually very costly to access. UN guidelines aim to reduce the group transactions that negatively affect domestic revenues thereby affecting foreign direct investment and national development. The use of OECD guidelines is a consensus among the 36 OECD countries while only 43 out of the 193 UN countries (22%) have adopted the UN transfer pricing guidelines (UN, 2017). Though there is consistency between the OECD and the UN the guidelines are not identical, and as such the following differences are visible.

4.5.1.3 Transfer Pricing Methods

The UN borrows the OECD's five transfer pricing methods; however, it adds an additional method termed "Commodity Rule" method (UN, 2017). The commodity rule method uses the quoted prices of the commodity market to price the transactions between associated enterprises (UN, 2017). The method is used in Latin American countries, but the UN manual neither approves nor disapproves the commodity rule method. Grondona (2018) explains that the commodity rule method provides clarity and objectivity in the determination of the price, however, it is limited by challenges such as finding a suitable benchmark and variations in the date of the quote to be applied (for example shipping date or delivery date). It is important to note that, to minimize disputes, both the OECD and the UN encourage tax authorities to administer Advance Pricing Agreements (APAs).

4.5.2 Similarities between the OECD and UN Guidelines

The similarities between the two guidelines include following the arm's length principle and adopting the same methods. The similarities are mainly in the application of the guidelines including the treatment of intangibles and treaties. Lack of comparable data and preparation of transfer pricing documentation are also common in the application of the two, and are discussed next.

4.5.2.1 Requirements for Documentation

Both the OECD and the UN require taxpayers to prepare a three-tier documentation from MNEs which include the master file, local file and the Country-by-Country (CbC) report (OECD, 2017: Chapter V); UN (2017: Chapter 7). The master file provides an overview of the MNE group business lines, including a list of important agreements, controlled transactions and intangibles. The local file provides information on the specific intercompany transactions as well as the justification for the choice of transfer pricing method. The CbC report provides jurisdiction-wide information on the allocation of income, taxes paid and core business activities of each constituent entity. This documentation is widely used by tax authorities to assess transfer pricing risk and check for compliance (OECD, 2017:230)

4.5.2.2 Lack of Comparable Data

Both the OECD and the UN encourage the use of domestic databases by national tax authorities. However, developing countries have particular difficulty in obtaining reliable comparable data for the purposes of determining transfer prices and since Zimbabwe is still developing, measures to regulate MNEs transactions in a developing country set-up is crucial. Thus, it is often extremely difficult, in practice, especially in some developing countries, to obtain adequate information to apply the arm's length principle for the following reasons:

- In developing countries there tend to be fewer organized players in any given sector than in developed countries. As a consequence, finding proper comparable data can be very difficult;

- In developing countries, the comparable information may be incomplete and in a form which is difficult to analyze because the resources and processes are not available. In the worst case scenario, information about an independent enterprise may simply not exist.
- In many developing countries, whose economies have just opened up or are in the process of opening up, there are many "first movers" who have come into existence in many of the sectors and areas hitherto unexploited or unexplored; in such cases there would be an inevitable lack of comparables."

The above discussion explains the diverse transfer pricing methods that are available, and when they are most appropriate. The findings show that the traditional transaction methods are easier to apply than transactional profit methods, but are limited by availability of comparable data. Further, the OECD and the UN are largely consistent, but not identical, and the UN guidelines focus on adressing developing countries' administrative needs. The challenges faced by developing countries in applying these guidelines are more or less the same. Next is a summary of the international transfer pricing guidelines to enable a comparison with the Zimbabwean transfer pricing rules.

Table 3: Summary of International Transfer Pricing Guidelines

ITEM	International Guidelines	
	OECD	**UN**
Documentation	Chapter V of the OECD guidlines prescribes a three-tier structure consisting of (i) a master file containing standardised information relevant for all MNE group members; (ii) a local file referring specifically to material transactions of the local taxpayer; and (iii) a Country-by-Country (CbC) report containing certain information relating to the global allocation of the MNE's income and taxes paid. The guidelines require that the transfer pricing analysis be based on full functional analysis and a full comparability analysis However, the OECD/G20 Final Documentation Report, Annex IV recommends only MNEs with at least income of €750mil to be required to file the CbC report. This code was in line with BEPS' Action 13 which is centred on re-examining transfer pricing documentation (Ernst and Young, 2015).	The UN follows the OECD documentation requirements but recommends that guidance on the content of the local file should include specific materiality thresholds that consider the size and nature of the MNE. It suggests that the materiality levels be customised to the local legislation as a fixed amount or revenue/cost thresholds (B1.8.10). It also encourages SMEs to be exempted from maintaining documentation or giving them thresholds based on volume of transactions (C2.4.4).
Deadlines	The OECD leaves the prescription of these to domestic law.	The UN also leaves this decision to the domestic law.
(Advanced Pricing Agreements (APAs)	The OECD encourages APAs under the Mutual Agreement Procedure (MAP APA). The main objective of the MAP APA process is to eliminate potential double taxation. The OECD acknowledges that unilateral APAs have several concerns resulting in countries preferring bilateral or multilateral APAs	The UN also supports both bilateral and multilateral APAs, however, it indicates that they are resource intensive (C.4.4.2.2).
Penalties	The OECD states that for tax authorities to encourage compliance, they should establish transfer pricing penalty regimes that reward timely and accurate preparation of transfer pricing documentation. The OECD encourages document specific penalties as they ensure efficiency in transfer pricing documentation requirements and hamper non-compliance (D7 para 5.40).	The UN indicates penalties can either be for failure to pay tax or failure to comply with documentation requirements (C.2.4.3).
Dispute resolution	BEPS Action 14 encourages countries to make dispute resolution mechanisms effective (Ernst and Young, 2015).	The UN advocates for an independent judicial system that gives impartial attention to (tax) cases and that can boost investor confidence.
Databases/ Comparable data	Paragraph A4.3 supports the use of non-domestic databases only if internal ones are unavailable, but discourages application by tax authorities of transfer pricing methods based on information undisclosed to taxpayers.	The UN also encourages the use of internal databases first before consulting external databases (C5.6.4).
Domestic TP	The OECD does not cover transfer pricing of domestic transactions.	The UN is also silent on transfer pricing relating to domestic transactions.
TP methods	Prescribes 5 TP methods that are classified into two broad categories - traditional and profit methods.	Borrows 5 TP methods from the OECD.

Source: Own Compilation

Set out below is Table 4 which summarises the extent to which Zimbabwe complies with the international transfer pricing guidelines in a bid to assess the Zimbabwean rules.

4.6 The extent to which Zimbabwe has complied with international guidelines

Although Zimbabwe has made strides to enhance its transfer pricing rules, their effectiveness is marred by the following issues stated in Table 4.

Table 4: Zimbabwe's Compliance with International Guidelines

ITEM	Zimbabwe Rules
Documentation	While the OECD nad the UN outline the documentation requirements, Section 98 requires that taxpayers maintain transfer pricing documentation which is prescribed in the 35th schedule, however, the schedule does not prescribe any requirements. The country has, to date, not legislated CbC reports.
Deadlines	It is not clear whether the documentation should be contemporaneous or filed with the tax returns.
APAs	While the international guidelines encourage APAs, the Act has no provisions for APAs, but rather advance tax rulings.
Penalties	The international guidelines recommend that penalties be specified. Penalties specific to non-compliance of transfer pricing rules are not defined in Zimbabwe.
Dispute resolution	Normal dispute resolution procedures seem to apply for all tax disputes, including those relating to transfer pricing.
Databases/ Comparable data	The Act acknowledges that the internal databases maybe unavailable and so other sources are permissible. Reliability thereof is considered on a case-by-case basis.
Domestic transfer pricing	The rules apply to domestic transactions yet the international guidelines do not cover them
Transfer pricing methods	Zimbabwe complies with the OECD transfer pricing methods as the 35th schedule prescribes the OECD's five methods.

Source: Own Compilation

The above table compares the transfer pricing rules in Zimbabwe against the transfer pricing provisions as per the international guidelines. Although Zimbabwe has aligned its rules with the OECD guidelines, disparities – such as transfer pricing legislation incorporating transactions at a domestic level in Zimbabwe – exist. Furthermore, the OECD explicitly prescribes the documentation requirements while Zimbabwe is not explicit on that. The OECD and the UN also encourage three-tier reporting including the Country-by-Country (CbC) reporting, but Zimbabwe is silent on the specifics of the documentation. Reports have shown that many countries are legislating CbC reports with the most recent one being Nigeria (KPMG, 2018). However, Bruce (2011) warns that providing disclosures such as the CbC reporting is a challenge as it is not supported by policy makers in some countries and would be costly and difficult to understand for both the preparers and users of the information.

The UN guidelines are torn between maintaining consistency with the OECD guidelines and reflecting on the realities of developing countries. The Zimbabwean legislation also differs from international practice by incorporating transfer pricing rules to domestic transactions, a system which was previously applied by India (Section 92 of the Indian ITA) but recently repealed because of the burden imposed on domestic enterprises (Sachin, 2017; PWC, 2017). Sachin (2017) reports that transactions between related Indian enterprises are now exempted from transfer pricing provisions thereby reducing the tax burden of domestic enterprises, but this also means that such transactions are not required to meet the arm's length criteria.

Furthermore, APAs would minimise tax disputes, but Zimbabwe only has advance tax rulings, and in cases of a transfer price adjustment, the traditional penalties are applied with no specific penalty regime for transfer pricing offences. Though the OECD encourages countries to use effective dispute resolution mechanisms specifically for transfer pricing matters, Zimbabwe has general dispute resolution procedures for all tax related matters including transfer pricing. Both the OECD and the UN encourage the use of internal sources for comparable data, but Zimbabwe does not maintain any databases for comparable data. The new legislation strengthens the transfer pricing rules, but these have still not addressed some of the pertinent issues such as those highlighted above.

4.7 Summary

For a deeper understanding of transfer pricing, the chapter started off with exploring the OECD guidelines which are widely applied in the world. The OECD guidelines were found to be applied in most international transfer pricing issues, which has resulted in the formulation of five arm's length transfer pricing methods (Section 4.3) which can help harmonise transfer pricing disputes between taxpayers and tax authorities. The OECD's arm's length principle has been described as an important tool in minimising transfer pricing abuse, though it comes with its own limitations. The UN guidelines were also considered and it has been noted that although it focuses on addressing the interests of the developing countries, it has retained the majority of the OECD guidelines, and its adoption in the developing world remains low. Similarities and differences between these international guidelines and Zimbabwean laws provided invalueable insights into where Zimbabwe can improve its transfer pricing regime.

Assessing the adequacy of the transfer pricing regime in Zimbabwe would have been incomplete without exploring the possible transfer pricing methods available for use, and thus objective 1 & 2 have been met. The following chapter is a review of transfer pricing practices by other countries and how they could be applied in Zimbabwe.

CHAPTER 5: TRANSFER PRICING BEST PRACTICES

"No government can exist without taxation. This money must necessarily be levied on the people; and the grand art consists of levying so as not to oppress" - Frederick the Great

5.1 Introduction

The preceding chapter examined the prescriptions of international transfer pricing standards, and compared them against the transfer pricing rules in Zimbabwe. This chapter reviews how other countries have applied these guidelines and the challenges and experiences that they have had in doing so and considers how they have overcome these challenges.

As set out in objective 3 (section 1.5), this chapter focuses on how different countries have dealt with transfer pricing in order to reduce their risk of revenue losses. Zimbabwe's major trading partners are South Africa (Section 5.2), Kenya (Section 5.3), China (Section 5.4) and the United Kingdom (5.5) – all of which have already introduced transfer pricing (Regfollower, 2017a) and are considered in this chapter. The countries reviewed were chosen based on the principles outlined above. This chapter narrates the transfer pricing rules and experiences of these countries to draw lessons from them, and to help assess the adequacy of Zimbabwe's transfer pricing rules (discussed in Chapter 3) in minimising tax leakages through transfer pricing.

For each of the countries, the following issues were explored to allow for a comparison; transfer pricing legislation, tax authority, and definition of related party, thin capitalization, and acceptable transfer pricing methods, Advanced Pricing Agreements (APAs, comparable databases, documentation, audit procedures, penalties and dispute resolution provisions. However, primary references for the transfer pricing rules of some of these countries were limited because of language and access challenges.

5.2 South Africa

5.2.1 Tax Authority and Legislation

In Africa, South Africa is the most active country in legislating on transfer pricing issues (Kruger, 2012). It first introduced transfer pricing legislation in 1995, in terms of section

31(2) of the South African Income Tax Act (1962). The section requires connected persons/associate enterprises to deal at arm's length in respect of cross-border transactions. The rules and its interpretation were continuously being refined leading to the introduction of Practice Note 7 in 1999 (which provided taxpayers with guidance on how transfer pricing legislation would be applied by the South African Revenue Service (SARS)). South Africa was the first out of 52 African States to implement transfer pricing legislation in 1995, followed by Kenya in 2006 (PWC, 2012). South Africa is not a member country of the OECD (Oguttu, 2016). The Commentary on its Model Tax Convention are not legally binding, however South African courts have recognised OECD principles.

5.2.2 Definition of Related (Connected) Party

According to South African rules, a connected/associated party in relation to a company is defined as a company where shareholding is more than 50% or a company with at least 20% share capital holding and voting rights and there is no other majority shareholder (paragraph (1)(f) of the ITA 58 of 1962).

5.2.3 Thin Capitalization

The continuous reviews by South Africa have also resulted in the country's thin capitalization rules being replaced by the arm's length principle (Siwele, 2011). South Africa repealed its 3:1 thin capitalization ratio and since then all transactions are required to be at arm's length (Siwele, 2011). However, by virtue of complying with the arm's length principle, Section 31 (2) of the ITA implies that any interest which is not similar to what would have been charged between independent enterprises will be disallowed as a deduction.

The primary adjustment of Section 31(2), effectively disallows a portion of the deduction of interest incurred in the hands of the borrower. A further transfer pricing related adjustment is required in terms of Section 31(3) that attracts dividends tax at 20% for any dividend paid on or after 22 February 2017 unless an exemption or reduced rate is applicable. Since 1 January 2015, the amount of the adjustment is deemed a dividend consisting of a distribution of an asset in specie declared and paid by that resident to that other party to the affected transaction. Dividends tax payable by a company on a dividend in specie or a deemed dividend falls outside the ambit of the dividends article of a tax treaty and therefore cannot be reduced in terms of the dividend article of a treaty (van der Zwan, 2017).

5.2.4 Transfer Pricing Methods and Comparables

The South African rules explicitly state that the OECD guidelines are followed if their legislation is silent. Though not a member of the OECD, SARS accepts the OECD's five transfer pricing methods; CUP, RPM, CPM as well as PSM and TNMM, and has no priority method (Deloitte, 2016).

Like most of the African countries, comparable data for South African private companies is not publicly available. Therefore, Pan-European comparables are mostly used in South Africa (Deloitte, 2016), specifically the Bureau van DijkOrbis database (KPMG, 2016). However, comparables from other regions may be acceptable if the reasons to use them are explained in the policy document (Deloitte, 2016).

The Davis Tax Committee (DTC) (2014), appointed by the South African government to assesss the South African tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability, recommended that South Africa does not attempt to issue its own guidelines regarding the Transactional Profit Split Method (TPSM) but waits for the outcome of the OECD work still to be performed. The absence of local South African comparables is not the determinant that the TPSM is the most appropriate method. However, the availability of all data should first be assessed as failure to do so will lead to all countries that have no data adopting the TPSM, which will potentially give rise to corresponding double taxation and transfer pricing dispute risks.

Regarding low value added services (which are head office expenses such as management, technical and service fees), MNEs claim deductions for various services often leaving little or no profit in the paying country. South Africa adopts the simplified approach based on the actual cost of the services (with a pre-determined suitable allocation key) plus a standard mark-up, recommended to be 5%, as proposed by the OECD, but also implements a suitable threshold for the amount of such services, to which this method can be applied (SARS Practice Note No. 7 (1999); DTC (2014)).

For pricing commodities, the OECD recommends the application of the CUP method and advises that this may be determined using quoted prices with suitable comparability adjustments. South Africa follows the OECD Guidelines on commodities.

5.2.5 Advanced Pricing Agreements (APAs)

As mentioned previously, an APA is an arrangement where the MNE can agree on an appropriate transfer pricing method in advance over a fixed period of time (Lohse and Riedel, 2013:8). South Africa still has no APAs or any advance rulings that cater specifically for transfer pricing even after Oguttu (2006b:473) advocated for their adoption in South Africa. The DTC recommended that at least one legally Binding General Ruling (BGR), as provided for in Section 89 of the Tax Administration Act, 2011, be enacted in respect of Section 31. Without departing from the OECD Transfer Pricing Guidelines, the suggested General Ruling should include a set of principles reflecting the South African reality e.g. to define the method for converting the threshold amount to SA Rands. The DTC (2014) also recommended "the implementation of an Advanced Pricing Agreement (APA) regime, which would also provide certainty for investors. In order to introduce the option for APAs to be obtained in South Africa, SARS would need to be given the resources to build an APA unit."

5.2.6 Documentation

Documentation supporting a tax return (including transfer pricing documentation) is due within 12 months from the end of the relevant financial year. The South African Revenue Service's Practice Note No. 7 (1999) paragraph 10.2 recommends the preparation of transfer pricing documentation. However, the practice note is outdated, and additional documentation requirements are governed by Notice 1334 of the Government Gazette 40375 volume 616 (South Africa Government Gazette, 2016). This notice has revised the documentation requirements and now requires a master file, local file and the CbC reporting file for MNEs in South Africa to be submitted to SARS 12 months after year end. Section 25 of the Tax Administration Act No 28 of 2011 (TAA) requires the completion of a CbC report. Section 29 of the Tax Administration Act No 28 of 2011 (TAA) has been extended to include document retention requirements for transfer pricing. These are onerous and go beyond the requirements proposed by the OECD under BEPS Action Plan 13 (Oguttu, 2016). South Africa has also set thresholds for companies with cross-border transactions exceeding R100 million to comply with the documentation requirements (Regfollower, 2017a). According to Section 210 of the TAA South Africa's documentation requirements have been revamped with a penalty of R16 000 per month of delay for non-compliance with the duty to submit the CbC report, master and local files.

SARS recommends that the documentation be contemporaneous meaning that "it continues to reflect the taxpayer's transactions and circumstances, and be prepared at the time the transaction is entered into" (Deloitte, 2016: 234). When SARS requests the documentation it must be submitted within 30 days although an extension can be applied for (KPMG, 2016). The UN (2017) emphasizes the need for SARS to build a specialised transfer pricing team, and annually update the CbC report, local and master files as recommended by the OECD.

The DTC (2014) recommends that Section 31 of the ITA refers to the OECD guidelines, on the basis that it is obligatory to apply these guidelines for companies that are part of a group that falls above the threshold (EU750mn) requiring CbC reporting, but also recommended it for smaller companies. Thus, as part of the mandatory application for groups above the threshold, it is recommended that all the documentation requirements should also be compulsory in terms of the legislation. This will ensure global consistency of application and documentation for such groups, as is recommended by the OECD, and foster a system on which foreign investors can rely (in line with the National Development Plan).

5.2.7 Audit Procedures

According to PWC (2015:923), "SARS follows the OECD guidelines in conducting transfer pricing investigations, however, it is likely to consider the guidance from the UN practical manual on transfer pricing for developing countries". All MNEs are targets for a SARS audit, with greater scrutiny on MNEs with associated enterprises in low-tax jurisdictions (PWC, 2015).

5.2.8 Penalties

SARS assesses the intra-group transactions and if they lack commercial justification and reasonableness, the prices are disregarded (UN, 2013:413). Ordinary penalties of up to 200% of unpaid tax apply on material non-disclosures and tax evasion (South African Tax Administration Act 2011, Chapter 15). Furthermore, interest is charged on outstanding taxes and penalties at a rate linked to the South African Reserve Bank's repurchase rate (Deloitte, 2014). Deloitte (2014) stressed that the changes to South Africa's tax laws have placed a greater compliance burden on taxpayers, making transfer pricing an area that requires careful planning in the country. If a transfer pricing adjustment is imposed, the taxpayers have the right to dispute the proposed changes with various options available (South African Tax Administration Act 2011, Chapter 9). South Africa has also introduced fixed penalties per

month for failure to comply with submission of transfer pricing documentation (Regfollower, 2018).

The DTC (2014) recommends that SARS considers coming up with additional measures to encourage compliance. Apart from imposing penalties on taxpayers, the OECD recommends that another way for countries to encourage taxpayers to fulfil transfer pricing documentation requirements is by designing compliance incentives. For example, where the documentation meets the requirements and is timely submitted, the taxpayer could be exempted from tax penalties or subject to a lower penalty rate if a transfer pricing adjustment is made and sustained, notwithstanding the provision of documentation.

5.2.9 Dispute Resolution

In South Africa, taxpayers can invoke Mutual Agreement Procedures (MAPs) or enter into a unilateral agreement with SARS or take the dispute to court (PWC, 2015). However, it is important to note that most South African disputes have been settled by unilateral settlement procedures (PWC, 2015). The lack of court cases may mean few advocates and judges have knowledge of transfer pricing and if the matter is brought to court, the courts are bound to consider international precedent (foreign case law) as local precedent is unlikely to be available (PWC, 2015). Furthermore, foreign case law is only persuasive and not binding on South African courts (PWC, 2015).

5.2.10 Transfer Pricing Challenges

Though the OECD Transfer Pricing Guidelines have been useful in providing guidance on the application of the arm’s length principle, it has its own flaws which impact on its practical application (UN, 2017). These include challenges in determining perfect comparables in the country, especially given that neither the country nor the African continent has databases containing comparable data. This poses challenges for both the taxpayer and the tax authority. South Africa has tried to overcome this by utilising European databases to determine arm’s length prices (PWC, 2015).

Though these databases do provide valuable information, there are a number of challenges in developing comparability adjustments to account for geographical differences (for example market size and political differences) (OECD, 2010a; Deloitte, 2014). In order to provide more comparable data, SARS has accepted comparable adjustments based on the country risk

ratings and risk-free rates (UN, 2013:411). In establishing an arm's length level SARS has effectively adopted a holistic approach which not only considers comparable data, but also other relevant economic factors (UN, 2013:411).

PWC (2015) further alludes to resource constraints faced by SARS causing a delay in concluding audits. The absence of a transfer pricing regime or Double Taxation Agreement (DTA) with certain African countries trading with South Africa poses problems as the Mutual Agreement Procedures (MAPs) are not available (SARS, 2018).

5.3 Kenya

5.3.1 Tax Authority and Legislation

Transfer pricing in Kenya was introduced in 2006, and is contained in Section 18(3) of the Kenyan Income Tax Act [Chapter 470]. Kenya distinguishes between transfer pricing issues and anti-avoidance issues. Section 18(3) of the Kenyan Income Tax Act eliminates the need for tax administrators to demonstrate a tax-avoidance motive as a pre-condition for making adjustments to related party transactions. The Act places the responsibility to substantiate the arm's length transaction on the taxpayer. The Kenyan Revenue Authority (KRA) established a transfer pricing unit called the Kenyan Revenue Training Institute (KRATI) in Mombasa, to educate its tax officials on transfer pricing issues (TPA Global, 2013).

5.3.2 Definition of Related Party

According to Section 18 (3) of the Kenyan Income Tax Act [Chapter 470], related party means those corporates with at least 25% voting power in the enterprise, and was expanded to include relationships with natural persons. The section further states that related party includes persons who participate directly or indirectly in the control, managment or capital of the company.

5.3.3 Thin Capitalization

Section 16(2) (j) of the Kenyan Income Tax Act [Chapter 470] restricts the deductible debt to equity ratio of foreign companies to 3:1 and the excess is taxed.

5.3.4 Transfer Pricing Methods and Comparables

The Kenyan government accepts the five methods plus any other method as may be prescribed by the Commissioner where the arm's length price cannot be determined using the five methods according to the Income Tax (Transfer Pricing) Rules (2006). The OECD guidelines will be accepted in the absence of specific guidance in the Kenyan transfer pricing rules (TPA Global, 2013). Local comparables are preferred, but unfortunately data in Africa is insufficiently published.

Due to a lack of local data sets most Kenyan taxpayers rely on European databases such as Amadeus and SMART to calculate comparable values to be used as basis for transfer prices (Deloitte, 2016). As stated above, foreign databases may not reflect actual circumstances in Kenya (TPA Global, 2013).

5.3.5 Advance Pricing Agreements

Like South Africa, Kenya has no Advance Pricing Agreement (APA) programme in place since it is believed that APAs tie up key resources by diverting tax authority's attention from key transfer pricing risks to attending to APAs negotiations (Jomo, 2012).

5.3.6 Documentation

The onus of proof is on the taxpayer who must provide documentation within 30 days, upon request (Income Tax (Transfer Pricing) Rules (2006)). There is no prescribed content or format of the transfer pricing documentation in the Kenyan legislation. Kenya has not yet implemented CbC reporting.

5.3.7 Audit Procedures

Deloitte (2014) reports that the KRA is aggressive in carrying out transfer pricing audits, challenging transfer pricing arrangements by taxpayers who report losses for several years and those who transact with associated enterprises located in tax havens. KRA has resorted to carrying out upfront risk-profiling before a full audit is conducted (PWC, 2015). These risk-based audits together with specialist transfer pricing audits are performed by KRA's large taxpayers' office specialist team. Although there are no supporting statistics, transfer pricing reforms are believed to have increased revenue in Kenya (PWC, 2012).

5.3.8 Penalties

Penalties are applied at the rate of 20% on unpaid taxes (Section 84(2)(b) of the Tax Procedures Act) and an extra 1% per month on the principal tax outstanding for the period it remains unpaid (Section 38(1) of the Tax Procedures Act), and if the taxpayer acted negligently, the penalty will be equal to double the amount that would have been avoided (Section 85 of the Tax Procedures Act). From June 2010 no interest will be charged on penalties (Section 85 of the Tax Procedures Act). There are no specified penalties for for failure to have transfer pricing documentation.

5.3.9 Dispute resolution

Aggrieved taxpayers have recourse through an appeal procedure provided for in the Income Tax Act. The first port of call is to provide a notice in writing to the local committee within 30 days, if not satisfied then the High Court of Kenya followed by the Court of Appeal and lastly by the Supreme Court of Kenya (Section 84 of the Income Tax Act [Chapter 470]). Alternatively, the taxpayer and revenue authority can enter into arbitration (Section 84 of the Income Tax Act [Chapter 470]).

5.3.10 Transfer pricing challenges

Revenue losses have compelled the Kenya Revenue Authority to introduce legislative, administrative and capacity-development initiatives to improve transfer pricing risk management (PWC, 2012). PWC (2012) highlights that these rules may not achieve its goals as the Kenyan Revenue Authority staff are not skilled in handling transfer pricing administration and identify instances of abusive transfer pricing. It further notes that the effective application of the rules is also frustrated by a lack of financial information on the performance and profitability of some MNEs associates outside Kenya and the unavailability of company comparable data.

This limitation results in difficulties to properly apply and monitor arm's length transactions. Even though the Kenyan Revenue Authority introduced a requirement for additional related party disclosures, lack of capacity cripples the tax authority's ability to review all the transfer pricing documents. It was reported that the lack of access to information on MNE operations, and the unavailability of local comparables erode the gains anticipated from transfer pricing reforms (PWC, 2012). Though Kenya also encourages arbitration, PWC (2012) indicated that

the lack of transfer pricing arbitrators and statutory enshrinement specific for transfer pricing dispute resolution in the country is hampering the effectiveness of efforts to resolve disputes.

5.4 China

5.4.1 Tax Authority and Legislation

China has become the second largest economy in the world after the US, with foreign companies investing in China being the driving force for this expansion (DezanShira and Associates, 2011). Its tax authority, State Administration of Taxation (SAT) is becoming increasingly sophisticated in transfer pricing, and is actively involved in the OECD's Base Erosion and Profit Shifting (BEPS) initiative (KPMG, 2016). China is ranked third as the world's strictest transfer pricing country after Japan and India (Cant, 2012). The promulgation of the Corporate Income Tax (CIT) law expands and provides specific guidance on the transfer pricing provisions, for instance clarifying contemporaneous transfer pricing documentation requirements (Enterprise Income Tax Law of the People's republic of China No 63). SAT offers interpretation notes in China by issuing circulars (designated as GuoShui Fa) which are in some instances replies to specific tax issues raised.

The growth of international trade has compelled China to reconsider its transfer pricing policies resulting in many reforms. It started in 1991, with Section 13 of the Enterprise Tax Law of the People's republic of China No 63 which gave the tax authority the right to make reasonable adjustments where transactions between associated enterprises were not at arm's length.

In 1998, China's tax authority (SAT) issued transfer pricing regulations for transactions between associated enterprises in SAT Circular No 59, and were later amended in GuoShui Fa [2004] No. 143 (DezanShira and Associates, 2011).

Rules for APAs in China were issued in 2004 in GuoShui Fa No 118. In 2007, the 1991 Section 13 was repealed by CITL state council order No 63 which was effective 2008 (DezanShira and Associates, 2011). This was a comprehensive regulation which addressed numerous transfer pricing issues including thin capitalization.

Then GuoShui Han [2007] No. 363 was issued prescribing the documentation requirements and information to be submitted by taxpayers to SAT. Tax law in China on transfer pricing includes the Articles 36 and 51 of the Tax collection and Administration Law; Articles 41-48 of the Enterprise Income Tax Law of the People's republic of China (Chapter 6, Special Tax Adjustments) that came into effect on 1 January 2008 (Deloitte, 2014). There was another instrument issued, GuoShui Fa 2008 No 114, and then a more comprehensive piece of legislation was issued in 2009, GuoShui Fa [2009] No. 2 [China Transfer Pricing Regulations]. The regulation repealed GuoShui Fa [2004] No. 143 and GuoShui Fa [2004] No. 118. The legislation clearly provided guidance on conducting transfer pricing audits and investigations, APAs and thin capitalization (DezanShira and Associates, 2011).

China has been continuously revising its transfer pricing guidelines and the following SAT documents released recently form the framework for transfer pricing enforcement in China:

• Bulletin Gonggao [2017] No. 6 (Bulletin 6) — *Bulletin on Supervisory Measures for Special Tax Investigation Adjustments and Mutual Agreement Procedures*

• Bulletin Gonggao [2016] No. 64 (Bulletin 64) — *Bulletin on Issues Related to Improving the Administration of Advance Pricing Arrangements*

• Bulletin Gonggao [2016] No. 42 (Bulletin 42) — *Bulletin on Improving Administration of Related Party Transaction Reporting and Contemporaneous Documentation* (Ernst & Young, 2018).

5.4.2 Definition of Related Party

According to Bulletin 42, China defines a related party as an enterprise or directly or indirectly owns 25% or more of the shares of the other enterprise; or a third party with significant control (25%) over the taxpayer's senior management, purchases, sales, production, capital financing and the intangibles and technologies required for the business.

5.4.3 Thin Capitalization

China also stipulates the thin capitalization rules in Circular Gaishui [2008] No. 121 which prescribes a debt to equity ratio of 2:1 for non-financial entities and 5:1 for financial institutions (PWC, 2015). Generally, any excess would be non-deductible, however, circular 121 further stresses that the excess interest "may still be deductible if the enterprise can provide documentation that the intercompany financing arrangements comply with the arm's length principle or if the effective tax burden of the Chinese borrowing company is not higher

than that of the Chinese lending company" (PWC, 2015:319). The question then is whether to use an arm's length approach or the formula based approach to determine the ratio to assess deductibility. Therefore, further guidance on how to apply capitalization rules may be required [DezanShira and Associates (2011)].

5.4.4 Transfer Pricing Methods and Comparables

China follows the OECD guidelines, its five transfer pricing methods and accepts other methods consistent with the arm's length principle. Furthermore, SAT Bulletin 6 prefers the TNMM method which is not appropriate in transactions where the tested party has substantial intangible assets, and that the profit split method be applied by high and new technology enterprises (Regfollower, 2017a).

SAT requires the use of Chinese comparable companies (listed on the Shanghai & Shenzhen stock markets), but foreign comparable companies may be accepted (Deloitte, 2016). It also recommends the use of the Bureau van Dijk Osiris database (Deloitte, 2014).

5.4.5 Advance Pricing Agreements (APA)

APAs were first introduced in China in 1998 in Circular 59, which, however, had a number of deficiencies and was replaced by GuoShui Fa 2004 No 118 (DezanShira and Associates, 2011). By 2009 APAs were available under Chapter 6 of GuoShui Fa 2009 No 2. From that date the Chinese tax authorities have concluded and signed a considerable number of both unilateral and bilateral APAs. It is reported that the majority of these were negotiated and finalised in less than a year, and statistics show that TNMM had the highest usage, followed by CPM, and then CUP and the rest of the other methods (SATAPA report 31/12/2010 as cited in DezanShira and Associates, 2011). To qualify for an APA in China, one would need annual related party transactions worth over Ren Min Bi (RMB) 40 million for the last three years prior to the application (UN, 2017). China has the three APAs; unilateral, bilateral and multilateral APAs and the application procedures for mutual agreement procedures are prescribed in SAT Bulletin 6.

5.4.6 Documentation

China requires contemporary documentation but exempts those enterprises that have annual amounts from related party tangible goods transactions being lower than RMB 1 billion (UN, 2017). Chinadocumentation requirements also exempt transactions that are covered by an

APA as well as for an enterprise that only transacts with domestic associated enterprises or if the foreign shareholding is below 50% (DezanShira and Associates, 2011). The documentation requirements have specified thresholds (UN, 2017). The required documentation has to be completed by May 31 of the following tax year, has to be written in Chinese, must be provided within 20 days of a request, and must be retained for 10 years from 1 June following the relevant tax year (Ernst and Young, 2016a). China has also introduced CbC reporting regulations (Public Notice 42) which outlines the requirements for master file and the CbC report.

5.4.7 Audit Procedure

China has specific audit procedures for taxpayers with related party transactions which are not at arm's length. The audit procedures are clearly outlined in Circular 2 (DezanShira and Associates, 2011). According to Cant (2012) the audit procedure starts with the initial inquiry followed by a preliminary information request, a formal audit notice, field interview and investigation, a preliminary audit opinion and negotiating a transfer pricing adjustment to appeal. According to Wang (2016), "As suggested by the OECD Transfer Pricing Guidelines a comparability analysis is also provided for in the Circular 2".

5.4.8 Penalties

The income tax return has nine related party transaction disclosure forms, and failure to file these forms attracts penalties ranging from RMB 2,000 to RMB 10,000 (Deloitte, 2016) (Equivalent to US$313-US$1,565 using the 23/5/2018 exchange rate of 1RMB=0.16USD). For failing to provide contemporaneous documentation or providing incomplete or false information, taxpayers will be penalised from RMB10,000 to RMB50,000 (Deloitte, 2016).

Furthermore, transfer pricing adjustments are subject to interest (imposed on the tax underpayment) based on the RMB benchmark lending rate published by the People's Bank of China plus penalty interest of 5% if the taxpayer has not complied with the contemporaneous documentation requirements (Deloitte, 2016). However, the 5% penalty may be waived if the contemporaneous documentation is prepared and provided on time (Deloitte, 2016).

5.4.9 Dispute Resolution

Chinese tax legislation gives broad discretionary powers to tax authorities, therefore a friendly working relationship is advantageous to the taxpayer (PWC, 2015). That means if an

MNE disagrees with its initial tax assessment from the tax authority, it can provide written explanations and documents justifying the reasonableness of their transfer prices. Further discussions and negotiations may continue until the tax authority reaches a conclusion and issues a written notice of audit assessment referred to as a "Special Tax Adjustment Notice". After this notice, the decision is final and no further negotiations are allowed.

If the taxpayer disagrees with the adjustment, it can appeal to the tax authority at the next higher level within 60 days and the decision of the appeal must be made within 60 days (PWC, 2015). However, before proceeding with the appeal process the taxpayer is required to pay the taxes, interest levy, fine and any surcharge (PWC, 2015). If the taxpayer is not happy with the decision, it may start legal proceedings in China's People's court within 15 days upon receiving the written decision. However, there have been very few cases brought to the People's court (PWC, 2015).

5.4.10 Transfer Pricing Challenges

China initially had ten members as part of the transfer pricing staff team, and this has been causing a lot of inconsistencies in the application and interpretation of the transfer pricing principles in a big economy like China, so SAT was working on developing 500 transfer pricing specialists to curtail the challenges encountered (DezanShira and Associates, 2011). Only ten staff members would be inadequate considering China's volume of international trade transactions, and so more specialists would be needed.

According to Wang (2016) like most developing countries, China faces transfer pricing challenges with the arm's length principle. He emphasises that even after developing countries overcome issues of sound legal transfer pricing framework they are often faced with the issue of a lack of sufficient transfer pricing specialists to carry out the analysis as well as reliable comparables for the analysis. Wang (2016) further explains that because in China, private companies are not compelled by law to disclose their financial information, this leaves limited comparable information resulting in foreign companies being used as alternative to domestic comparables. Wang (2016) stresses that finding a comparable transaction is hard, and usually countries that perform similar functions, assume similar risk and own similar assets are used instead. He highlights that though widely used, the short-comings of arm's length principle should be acknowledged.

5.5 United Kingdom

5.5.1 Tax Authority and Legislation

The United Kingdom (UK) is a member of the OECD and its tax authority, Her Majesty's Revenue and Customs (HMRC), supports the OECD's development on Base Erosion and Profit Shifting. For years ending before 1 April 2010, Schedule 28AA ICTA 1988 was in use, then it was replaced by Part 4 of the Taxation International and Other Provisions Act 2010 (TIOPA, 2010) (PWC, 2015). Effective 1 April 2015, the UK also introduced new anti-avoidance provisions, the diverted profits tax of 25% which applies to arrangements designed to divert profit from the UK and involve transactions or enterprises that lack economic substance (Deloitte, 2016).

Deloitte (2016) indicated that HMRC publishes guidance on the interpretation of its transfer pricing legislation in the International manual at INT M410000. This should serve to minimise misinterpretations and disputes. The researcher used secondary sources as the manual is not accessible on the public domain.

5.5.2 Definition of Related Party

The United Kingdom (UK) defines a related party generally as when there is 51% control of a company and 40% in the case of joint ventures based on voting power and share capital, as well as any persons acting together to control financing arrangements (Section 148 of the TIOPA 2010)).

5.5.3 Thin Capitalization

Taxation International and Other Provisions Act (TIOPA) 2010 Part 4 includes provisions for financial transactions where HMRC can challenge the deductibility of interest by a UK company on a loan from a related party for which either the interest rate or loan itself is excessive. The basis for determining whether the amount of loan or interest rate is excessive is the arm's length principle (PWC, 2015). The UK strengthened its interest restriction rules in 2017 by enacting Finance (No.2) Act 2017 leaving the accepted debt to equity ratio at 1:1 and the interest cover at 3:1.

5.5.4 Transfer Pricing Methods and Databases

The United Kingdom incorporated the OECD guidelines in its transfer pricing legislation and accepts the five transfer pricing methods together with other methods which conform to the arm's length principle. In these methods, there is no priority method (KPMG, 2013). In the United Kingdom comparative data is readily available with HMRC preferring the UK comparables though other European Union comparables can be used only if the UK data is unavailable (Deloitte, 2016).

5.5.5 Advance Pricing Agreements

The United Kingdom also has mutual agreement procedures which are set out in part 2 of TIOPA 2010 (ss124-125) and the statement of practice SP 1/11 provides guidance on arbitration and mutual agreement procedures. It also has Advance Pricing Agreements (APAs) which are prescribed in part 5 of TIOPA 2010 (s218 etseq). Practice SP2/10 sets out best practices on advance rulings and the statement of practices SP 1/12 also has details on advancing thin capitalization agreements.

5.5.6 Documentation

The United Kingdom's legislation requires contemporaneous transfer pricing documentation to be prepared annually and must be made available upon request. Guidance on the preparation of documentation is provided in the International manual 483030 . The manual does not prescribe a format, but rather lists the minimum required documentation, for example, evidence to demonstrate an arm's length price and records of transactions with associated enterprises. Generally, documentation must be provided within 30 days of request and failure to do so attracts a penalty of £3 000 per tax return (Finance Act 1998, schedule 18 para 23 (1). The transfer pricing rules exempt SMEs from applying the documentation requirements.

5.5.7 Audit Procedures

The probability of a tax audit is low given that HMRC operates a risk assessment approach to audits. Only those MNEs deemed to be of high risk in transfer pricing issues will be subject to an audit (PWC, 2015). HMRC has a centralised specialist transfer pricing unit which is part of HMRC's corporate tax, international and anti-avoidance directorate involved in the transfer pricing enquiries into large MNEs (PWC, 2015).

5.5.8 Penalties

The HRMC can make an adjustment and penalties are based on the taxpayer's behaviour that caused the error; no penalties if reasonable care was taken; up to 30% for careless behaviour; up to 70% for deliberate careless behaviour and as high as 100% for deliberate and concealed error (Schedule 24 of Finance Act 2007).

5.5.9 Dispute Resolution

The taxpayer can appeal against a transfer pricing adjustment, and this will be heard by the Tribunals Service (KPMG, 2013). The UK has specific commissioners deciding on transfer pricing cases (PWC, 2015).

5.5.10 Transfer Pricing Challenges

HMRC periodically updates its manuals which are prepared for internal use by the tax authority as well as publicly available and accessible on the HMRC website. These manuals provide a detailed description of how the tax authority interprets the existing legislation and explanations of its developments (PWC, 2015). According to PWC (2015) "the HMRC does not have power to directly obtain information on non-UK-resident parents of UK companies, nor on fellow subsidiaries (in non-UK-controlled groups) that are not UK-resident". However, the UK has an extensive Double Tax Treaty (DTT) network so is able to request such information under the Exchange of Information article (PWC, 2015).

The next section summarises the key points discovered from the various tax jurisdictions examined in this thesis, and discusses the possible categories that they fit in.

5.6 Transfer Pricing Categories

All the countries discussed above have adopted the arm's length route, and follow the five methods suggested by the OECD. All have no preferred method, and do not accept the global formulary apportionment method. Lohse et al (2012) conducted a study in which they examined 44 countries over a period of nine years to analyse the stringency and impact of differing transfer pricing regulations, and came up with six categories of transfer pricing regulations. The results of the study revealed greater importance of transfer pricing regulations. Six categories were presented with category '0' being the least strict category (with no general anti-avoidance rule/no transfer pricing rules and no documentation

requirements) and ‘5’ the strictest. Category 1 is ALP in national law with no documentation requirements, category 2 is ALP at national law, but documentation requirements not in national law, but expected to exist in practice (audit). Category 4 is ALP and short disclosure of documentation in national law. In 2009, China was identified in category 5 (with arm’s length principle and long disclosure of documentation in national law) while the UK was also identified in category ‘5’ (Lohse et al, 2012). From the analysis of this chapter, South Africa, China and the UK would be in category ‘5’, while Kenya would match category ‘3’ which has documentation requirements in their tax laws but has to be provided upon request. Zimbabwe which follows the arm’s length principle, but with no clear documentation requirements in national tax law, but required to exist in practice (audit) would match category ‘2’.

After having examined transfer pricing practices in other tax jurisdictions, the following table summarises the rules in these countries against the Zimbabwean rules and the lessons drawn from these follow.

Table 5: Country Summary

Country	Arms Length Principle	Formulary Apportionment	Thin capitalization Rule	Methods	Databases	APAs	Documentation Guidelines	Pricing Audit Procedures	Penalties	Interpretation Notes	Transfer Pricing Category
China	Yes	No	Yes	OECD	Yes	Yes	Yes	Yes	Yes	Yes	5
Kenya	Yes	No	Yes	OECD	No	No	Yes	Yes	Yes	No	3
South Africa	Yes	No	No	OECD	No	No	Yes	Yes	Yes	Yes	3
United Kingdom	Yes	No	Yes	OECD	Yes	Yes	Yes	Yes	Yes	Yes	5
Zimbabwe	Yes	No	Yes	OECD	No	No	No	No	No	No	2

Source: Own Compilation

From the above analysis, it is apparent that addressing transfer pricing problems is not a once-off thing, but rather progressive, and as such requires careful planning. It has also been revealed that Zimbabwe, like most developing economies, lacks capacity and that setting up an effective transfer pricing regime is costly and requires careful planning. Zimbabwe's unique environment poses challenges to both the tax authority and taxpayers, and missing guidance on some prime issues is a matter of concern. Therefore, Zimbabwe should consider introducing APAs, clear documentation requirements, providing interpretation notes, and a specific penalty regime as is the practice in other countries. Zimbabwe ought to keep up with the transfer pricing measures adopted by other jurisdictions to strengthen its rules, however, Oguttu (2016:9) warns that the cycle of continuously amending legislation to close the loopholes poses the risk of tax provisions becoming complex. Next is a discussion of the lessons that could be drawn for Zimbabwe from the other tax jurisdictions.

5.7 Lessons to learn for Zimbabwe from other nations' best practices

This section explores the transfer pricing challenges in Zimbabwe, and identifies lessons that could be drawn from its trading partners. Unlike the other countries, Zimbabwe is still lagging behind in a number of issues such as documentation, interpretations, penalties and APAs as discussed below.

Though Zimbabwe makes reference to the OECD guidelines, as well as the United Nations transfer pricing guidelines for developing countries, the country's transfer pricing rules lack clear guidance on the documentation requirements as there is no list of the minimum requirements or a deadline for submission. Unlike South Africa, the UK and China which provide guidance on the minimum requirements of the contents of the documentation, MNEs in Zimbabwe have no idea as to how the documentation should be prepared. All the other four countries provide deadlines for the submission of the documentation save for Zimbabwe.

Zimbabwe has specified its acceptable transfer pricing methods which makes it better when settling a dispute; however, how and when an audit arises is not clear. Countries such as Kenya and China have also set up a team specifically for transfer pricing and have the audit procedures well set. In Zimbabwe the Investigations Department of ZIMRA focuses on transfer pricing issues together with all other tax investigations.

Conclusively, four of the countries (South Africa, Kenya, UK and China) with specific transfer pricing legislation, impose penalties specifically on transfer pricing non-compliance. Normally it is a certain percentage (ranging from 10% - 200%) on the tax adjustment except in China (RMB 2,000 - RMB50,000) where the penalties are absolute figures. While most of the Zimbabwean counterparts specify the penalties and interest rates, the Zimbabwean legislation remains unclear on the punishment for failure to use an arm's length price or produce transfer pricing documentation. In the event of a tax adjustment, the decision as to whether the penalties will be imposed or if the taxpayer can negotiate with the Commissioner to waive the penalties is not clear. This ambiguity implies varied applications resulting in possible disputes between taxpayers and the tax authority as confirmed in the (CF (Pvt) Ltd Vs ZIMRA FA 22/2014) case.

While the use of APAs is critical, it has not received much support especially in Africa despite China and the UK having legislated these. APAs help prevent tax adjustments and disputes, and unlike China and the UK, Zimbabwe lacks mechanisms such as Advance Price Agreements, for transfer pricing purposes. This could be because of the costs and time consumed in the process of establishing APAs (OECD, 2010a:177). This is a setback since Oguttu (2006b) has commended them for bringing certainty because of the predetermined price.

Of the five countries, South Africa has repealed its thin capitalization rule, while the UK uses thin capitalisation agreements. However, van der Zwan (2017) has revealed that in practice, the use of the debt to equity rule contradicts the arm's length principle.

In defining a related party, Kenya and China expect control of at least 25%, South Africa 20% while the UK requires at least 40%. In Zimbabwe they consider any form of control which allows one to take directives and requests, but at least 50% in case of partnerships. It is clear that Zimbabwe has made attempts to address issues of tax avoidance by promulgating transfer pricing rules. However, the challenges that come with the application of the arm's length principle cannot be overstated especially in developing countries as explained in the preceding chapter. An arm's length price would require comparables, and Zimbabwean law does not state where the data can be extracted from. Considering the Zimbabwean economy, it would be difficult to have such databases.

How an arm's length price can be achieved demands significant resources for the tax authority and awareness on the part of the taxpayers (Durst, 2015a). Legislation is one step forward, but enforcement is another issue and given the capacity of ZIMRA and the availability of resources to execute their mandate it is questionable. As already alluded to, taxpayers make their decisions based on the decisions of their fellow taxpayers as well as the tax authority itself. If the tax authority is incapacitated, tax avoidance becomes the dominant strategy. Beuselinck et al (2014:1) found more income shifting by MNEs when the local tax enforcement is weak.

In light of the above, is the arm's length approach the way to go or should Zimbabwe settle for the alternative termed Global Formulary Apportionment (GFA) (Avi-Yonah, 2015). Jomo (2012:6) argues that GFA is not the solution since it is not adequately worked out in practice at the international level to replace the arm's length approach. More so, it has been unearthed that the country's major trading partners (China and South Africa) (European Commission, 2014) have adopted the arm's length principle, and it would only be advantageous for Zimbabwe to use a common basis with its trading partners.

Zimbabwe could, however, embrace other successful measures taken by other countries - for instance introducing APAs, clarifying transfer pricing documentation requirements such as the type of documentation (local/master/CbC) to be provided, timing of preparation and filing of the documentation and setting thresholds for such requirements. The solutions to deter debt financing are not yet clear as to whether fixed ratios work or not. Capacitating its tax authority through both legislative and administrative resources would also help deter tax avoidance through transfer pricing. A specialised transfer pricing team would strengthen ZIMRA's ability to detect transfer pricing abuse.

5.8 Summary

This chapter scrutinised the transfer pricing rules in Zimbabwe's major trading partner countries which include South Africa, Kenya, the UK and China in order to draw lessons from their experiences. In conclusion, it was discovered that of all the countries examined, have their transfer pricing rules based on the OECD guidelines. Despite its inherent flaws, the OECD's arm's length principle has turned out to be the more widely accepted model than the UN's transfer pricing guidelines. South Africa and Kenya have transfer pricing rules running in their countries, but they have had their fair share of challenges, the main one being

availability of comparable data, which presently seems to be far from being resolved. Differences between Zimbabwe's tax system and those of other countries that could be used by Zimbabwe to improve its system were also revealed. Therefore, recommendations were made from best practices in other countries reviewed. The next chapter presents the methodological choices and processes employed in this study in order to reach the conclusions of the study.

CHAPTER 6: RESEARCH METHODOLOGY

"In levying taxes and in shearing sheep it is well to stop when you get down to the skin" - Austin O'Malley

6.1 Introduction

The journey through the literature and the theoretical perspectives of this study revealed that the antagonistic relationship between tax authorities and the MNEs results in rational decision-making that is rules based and exploitative. Chapter 3, 4 and 5 have revealed some of the measures employed by various tax jurisdictions in order to counter the exploitative tendencies of MNEs. This chapter expounds on the methodological choices employed in this study in respect of the research paradigm (Section 6.2), research design (Section 6.3), research approach (Section 6.4) population and sampling (Section 6.5), data gathering methods (Section 6.6), data analysis (Section 6.7), methodological norms (Section 6.8) and the ethical considerations (Section 6.9) applied in the study to assess the effectiveness of the transfer pricing rules in Zimbabwe.

The quest to minimise tax avoidance through transfer pricing by assessing the adequacy of the Zimbabwean transfer pricing regime influenced the following research strategy as shown in the research map in Table 6. A detailed explanation of the selected research strategy which guided the research in order to accomplish the research objectives follows.

Table 6: Research Map

Research Paradigm	Interpretivism (Denzin and Lincoln, 2005)
Research Design	The study was exploratory (Babbie and Mouton, 1998:80). It was conducted using a combination of both primary and secondary data. The interview data were analysed by the researcher, qualitatively, aided by Computer Aided Qualitative Data Analysis Software (CAQDAS) called ATLAS.ti 8™.
Research Approach	Qualitative Approach (Denzin and Lincoln, 2005)
Population and Sampling	MNEs, MOF, ZIMRA officers, Tax Consultants appointed by MNEs as suggested by Hasseldine, Holland, and van der Rijt (2012) and Collins and Mulligan (2014:9). Purposive sampling and snowball sampling were applied to obtain information-rich participants.
Research Methods - Data Gathering	**Document review** (Bowen, 2009) was performed to obtain information specifically on transfer pricing such as court cases, legislation, and international transfer pricing guidelines, national budget statements and media. **In-depth interviews** (Kvale and Brinkmann, 2009) performed face to face with all the four groups, MOF, ZIMRA, MNEs and Tax Consultants used by MNEs were conducted.
Research Method - Data Analysis	Content analysis was performed applying the deductive and inductive approach (Brinkmann, and Kvale, 2015) for both interview and document review data. The tool used to integrate and systemise the interview data analysis was ATLAS.ti 8™ guided by Braun and Clarke (2014).
Methodological Norms (credibility, dependability, conformability, transferability)	The study followed the methodological norms of qualitative inquiries and observed all ethical issues (Moon et al, 2016).

Source: Own Compilation

6.2 Research Paradigm

Tracy (2013:38) refers to paradigms as “ways of understanding reality, building knowledge and gathering information about the world”. According to Creswell (2014:35) a paradigm or worldview is "a basic set of beliefs that guide action, they are philosophical assumptions, epistemologies, and ontologies broadly conceived research methodologies, and alternative knowledge claims,” as explained below.

Saunders, Lewis and Thornhill (2012) identify three research philosophical assumptions, namely ontological, epistemological and axiological which inform the approach and paradigm. Ontology is a position taken on the nature of reality and what can be known about it, while epistemology deals with the nature of knowledge and how it can be acquired and axiology illuminates judgements about values (Saunders et al, 2012). The ontological views of this study as influenced by Tracy (2013) are that the social phenomenon (transfer pricing) is created from the rational economic decisions and consequent actions of social actors [MNEs (and their consultants), ZIMRA; MOF]. This study believes that social actors such as taxpayers (MNEs) may place different interpretations on the situations in which they find themselves because of their own views of the transfer pricing rules (Tracy, 2013:58). These different interpretations are likely to affect their actions (for instance how much tax they pay) therefore this study seeks to understand the subjective reality (epistemology) of MNEs in order to be cognisant of their differentiated motives, actions and intentions in a meaningful way. The axiological view is that the human-infused dimensions around transfer pricing have knowledge value (Tracy, 2013:61). Therefore, this study is premised on the view that regarding the same phenomenon, (transfer pricing), both the taxpayers and the tax authority may interpret transfer pricing rules in different ways, which may not necessarily be within the original intention of the policy makers.

Creswell (2009:5) mentions four worldviews on which a study can be based; namely post/positivism, social constructivism also known as interpretivism, advocacy/participatory as well as pragmatism. Post/positive assumptions are more suitable for objective research while pragmatism is a realist view which suits mixed methods research (Creswell, 2014:36-40). The advocacy/participatory worldview was not considered in this study because of its philosophical underpinnings of collaborating with research participants. While post/positivism focuses on measuring behaviour objectively, interpretivism seeks to make

sense of the situation by examining not only the behaviour but also intentions and emotions (Creswell, 2014).

This study followed the interpretive philosophy as the researcher sought to interpret and construe the transfer pricing policy in Zimbabwe as well as the subjective perspectives of MNEs (and their tax consultants) regarding transfer pricing. It also considered the intentions of the lawmakers versus the motives of taxpayers who are the MNEs and the rationale of the legislators to enact new transfer pricing laws.

Though understanding the world of research subjects from their viewpoint is the challenge with interpretivism, post/positivism assumes singular true reality which Saunders et al (2009) discards as impossible. This made interpretivism adept for this particular study as it is socially constructed (Tracy, 2013:41) in considering that taxpayers interpret legislation differently.

This study is problem-centred and is concerned with what works and what provides solutions to the transfer pricing phenomenon. The study attempts to find acceptable answers to the real world problem (transfer pricing) and the theoretical puzzle of tax compliance using the interpretive paradigm in the qualitative research tradition. The following section provides an outline of the research design adopted in this study.

6.3 Research Design

A research design outlines the procedures for each research activity in order to fulfil the research objectives (Cooper & Schindler, 2011). Given that the research questions and the intent of this study refer to human decision-making and the navigation of legislative systems in a conscious manner, this study followed the approaches, design and methods that helped assess the transfer pricing regime in Zimbabwe. An exploratory empirical approach (Babbie & Mouton, 1998:80) was followed because this research strategy assists in understanding the transfer pricing phenomenon (Saunders, Lewis & Thornhill, 2007) addressing questions such as who, what, where, when and how with respect to transfer pricing rules and practices (Creswell, 2009:51).

According to Saunders et al (2009), non-statistical approaches fit in qualitative research as they involve data gathering tools such as interviews and data analysis procedures that use

non-statistical data. This study employed in-depth interviews and a document review (Bowen, 2009:28) to gather data that helped assess the transfer pricing rules in Zimbabwe. In-depth interviews helped to find out how the MOF as drafters of the legislation, ZIMRA as the enforcing authority, and MNEs/Tax consultants as the taxpayers think or behave in relation to transfer pricing (Saunders et al, 2012). The document review helped with the navigation of legislative systems, theoretical views as well as understanding the transfer pricing strategies used by MNEs. A combination of both primary and secondary data helped strengthen the results, and foster credible assessment (Bowen, 2009:28).

To answer the question on the effectiveness of the transfer pricing framework in Zimbabwe, the researcher reflected on the rich data obtained from the interviews as guided by the research objectives and the theoretical positions of the study. The theoretical contributions were both inductively and deductively drawn (Hossein, 2015:60). Inductive analysis involved deriving themes from the researcher's careful examination of the data while deductive analysis entailed starting with the broad theory and testing its implications as described by Hossein (2015:60). The researcher worked more inductively with the interview data and more deductively with the document review. Qualitative paradigms focus on interpretation, practices and meanings (Brinkmann & Kvale, 2015). Interpretivism (Thorpe & Holt, 2008) helped the researcher to draw meaning from the narratives, practical examples and experiences of the participants. Interpretive research also helped uncover the meanings derived by the four economic actors in interpreting pieces of legislation in context and in practice.

The researcher sought to provide an account of the transfer pricing phenomenon and its representations within multiple realities as suggested by Ellingson (2014:3). The methodological choices of this study are a departure from what has predominated research approaches for transfer pricing studies such as those by Nielsen et al (2014); Fuest and Riedel (2010); and Lohse, Riedel and Spengel (2012). This study adds to qualitative accounting research, contrary to much of the tax compliance research, which has used quantitative inquiries. To the best of the researcher's knowledge, little research has followed this particular context within these particular lenses. Having identified the suitable design for the study, the research approach is explained next.

6.4 Research Approach

Though there is quantitative and qualitative research (Saunders, Lewis & Thornhill, 2009:13), the latter was adopted in this particular study because this is a legislation and policy-oriented study which is non-numeric in nature, and quantitative/statistical approaches would not bring coherence with the research objectives of the study. Denzin and Lincoln (2005) state that a qualitative descriptive methodology suits an interpretive worldview and the present research seeks to interpret a phenomenon. The above authors further describe qualitative researchers as those that *"make the world visible, and transform the world and attempt to make sense of, or interpret, phenomena in terms of the meanings participants attach to them"*.

The qualitative approach was chosen based on the research problem, objectives and the theoretical gaps revealed in literature. Qualitative methods are selected for their ability to provide a detailed analysis of change (Kohlbacher, 2006). This characteristic was relevant when analysing the possible changes from using the general anti-avoidance rules to specific transfer pricing rules. Denzin and Lincoln (2000) further acknowledge that qualitative methods have exceptional abilities to cut across disciplines and subject matters, which once again is relevant to the transfer pricing construct in that it includes accounting, governance (auditing) and taxation matters.

The nature of this study instigated a shift from traditional ways of inquiry to the post-modern ways of inquiry to produce knowledge regarding transfer pricing without strict adherence to structural laws and theories that limit research processes (Pollock, 2012:9) and consequently, conventional quantitative methods could be departed from. This allowed multiple realities, as guided by crystallisation (Ellingson, 2009) to be embraced.

Ritchie and Lewis (2003) note that one function of qualitative research is appraising the effectiveness of what exists, thereby confirming its suitability for this study, which sought to assess the adequacy of the transfer pricing policy in Zimbabwe to minimise tax avoidance. The flexibility of qualitative methods (Ritchie & Lewis, 2003) as inspired by Collins and Mulligan (2014) assists in enhancing the understanding of the transfer pricing phenomenon in Zimbabwe.

To achieve the research objectives, the following section defines the population and sample sizes used in this study.

6.5 Population and Sampling

According to Howitt and Cramer (2011) the study population entails the gathering of all fundamentals which are of importance to the researcher, and Cooper and Schindler (2011) hold the view that a target population is the total elements on which the researcher wants to make some inferences. This study sought to influence policy and improve transfer pricing practice, therefore the population comprised of policy makers (MOF), enforcers of the policy (ZIMRA) and taxpayers (MNEs and/or their tax consultants). These four groups constituted the population of this study (as explained below) and were deemed knowledgeable on the subject matter.

The study also aimed to crystallise (Ellingson, 2014) the results with the use of both interviews and a document review. The targeted documents considered in the document review included Acts of Parliament, budget statements and court cases. Below is an explanation of the sampling strategy used for the document review and the interviews.

6.5.1 Document Analysis

Document analysis is defined as the process of reviewing or appraising documents whether printed or electronic (Bowen, 2009:27). The study purposefully selected relevant documents from academic to non-academic literature in order to achieve the research objectives. The sample documents were not selected based on quantity but rather, on the quality of the documents as emphasised by Bowen (2009:33) and given the objectives of the study. All the documents reviewed were taken from sources deemed to be authentic and from reputable sources and all of them ranged from national to international documents, available on public domains, such as Acts of Parliament. No confidential documents were used. International guidelines and national budget statements were reviewed to meet the study's objectives. Relevant court cases (Bowen, 2009:29) were also used to supplement these documents in order to provide insight as to the transfer pricing complexities and strategies used by MNEs (see Annexure 5). Libraries and the internet were the main sources of published information reviewed (Ekstrom et al, 2014:13).

Through the review of existing literature, the transfer pricing rules of selected regional and global jurisdictions were considered in order to draw lessons from them. Findings from these were compared with Zimbabwe and were used to assess the Zimbabwean rules (Chapter 5). Documents were examined, and interpreted to gain a rich understanding and empirical

knowledge (Corbin & Strauss, 2008) of the transfer pricing phenomenon and the rules that seek to address it.

An analysis of the documents helped to inform the interview questions. This analysis was supplemented with the data obtained from the interviews, and the findings contributed to the rigour of the study. Using a combination of the two data gathering methods as suggested by Bowen (2009:28) is a process referred to by Ellingson (2009) as crystallisation. Crystallisation underlines the view that many truths will avail themselves through more than one form of inquiry (Ellingson, 2009) in line with qualitative research assumptions. Compared to traditional triangulation (validation of data through two or more sources), the researcher through crystallisation, exercised flexibility in the interpretative epistemological processes under subjective ontological lenses (Ellingson, 2014:2). This allowed the researcher to go beyond mere confirmation of findings but rather achieve completeness (Tobin & Bergley, 2004:394) by embracing multiple realities (Cugno and Thomas, 2009:113), consulting multiple data sources and communicating non-academic accounts to various stakeholders including practitioners (tax consultants) (Ellingson, 2014:6).

6.5.2 Interviews

The sampling process was intended to locate participants who had knowledge and experience with transfer pricing. Sampling allowed the researcher to draw information from information-rich participants as the thrust was not on achieving large numbers (Brinkmann and Kvale, 2015) but on the depth and richness of the data obtained from the participants as discussed below.

In order to obtain insights into the transfer pricing phenomenon in an interpretivist paradigm the researcher purposefully selected four groups that enhanced the understanding of the subject (Onwuegbuzie and Leech 2007:242). Each group was composed of homogeneous elements, which according to Cooper and Schindler (2011) is critical to ensure that the sample is an accurate version of the population. The strength of purposive sampling in primary data gathering lies in selecting “information-rich” participants for in-depth analysis related to the transfer pricing issues being studied (Richardson, 2009).

A multi-stage sampling procedure was undertaken. Stage one comprised the selection of the three participating organisations (ZIMRA, MOF, MNEs). These organisations were

purposefully selected because of their relevance to the study. Stage two entailed selecting participating individuals from the respective organisations.

During stage one, the Revenue and Tax Policy Department in the MOF, was purposefully selected because it is the department responsible for the drafting of the transfer pricing rules in Zimbabwe. The department had a staff complement of eight people, but only three specialised in transfer pricing. During stage two, all three specialists participated in the interviews.

ZIMRA is a large organisation, and for the purposes of achieving the objectives of this study, ZIMRA's Head Office Investigations and International Affairs department was purposely selected as it is the one responsible for handling transfer pricing issues in Zimbabwe (stage one sampling). During stage two, a sample of ten (10) ZIMRA officers were purposefully selected to better understand the tax behaviour of MNEs, as well as to obtain the convergence or divergence to the responses from the MNEs, and the transfer pricing practices in the country as encountered by them.

In respect of the MNEs, no reliable database exists in Zimbabwe (at the time of the study) to allow selection of the desired participants. The unavailability of a reliable database of MNEs in Zimbabwe as well as the sensitivity of the subject (transfer pricing) made snowball sampling suitable for this particular study (Atkinson & Flint, 2001). Snowball sampling, also referred to as network sampling (Latham, 2007), was applied in identifying the possible MNE interviewees. Cohen and Arieli, (2011) described snowball sampling as the most effective technique available for hidden or hard-to-find populations or where adequate lists are not readily available as is the case with the MNEs. The first identified MNEs (through peer references) were requested to refer the researcher to other potential MNE participants; these were approached and added to the respondents list based on their cooperation. The majority of the MNEs referred the researcher to their tax consultants who were also interviewed until the sample size was large enough to understand the transfer pricing phenomenon. Brock and Pogge (2014) supports this referral by MNEs to their tax consultants as they believe that MNEs have a plethora of power and influence to hire external accountants that help devise sophisticated structures that enable MNEs to avoid tax.

Though sampling bias is naturally inevitable in both purposive and snowball sampling, these sampling techniques provide richer data than random sampling (Marshall, 1996). Snowball sampling facilitates accessibility of participants, and the fact that other participants nominate potential participants reduces researcher bias as the researcher relinquishes some control over the sampling process to the respondents (Noy, 2008).

A summary of the sampling frame for the document review and the list of interviewees is provided in Table 7 overleaf.

Table 7: Sampling Frame Summary – Interviews and Document Analysis

Group/Category **1st stage of multi-stage sampling**	**Population**	**Sampling method**	**Sample size** **2nd stage of multi-stage sampling**	**Justification for sample selection**
		Interviews		
ZIMRA	ZIMRA is the enforcing tax agent in the country and therefore is knowledgeable on the transfer pricing rules that they seek to enforce and challenge when MNEs use transfer pricing to circumvent tax. The department had 22 members including investigating officers and management at the time of the study.	Purposeful sampling: ZIMRA Department of Investigations and International Affairs were targeted.	10 officers	They have first-hand information regarding transfer pricing practices since they are the ones who audit MNEs. According to Creswell (2014:239) qualitative studies are characterised by small sample sizes of between 3-10 respondents. The sample size was therefore sufficient to provide reliable results.
MOF	The MOF is responsible for drafting the transfer pricing legislation, and therefore becomes a relevant participant as the policy maker. The Department had 8 members at the time of the study.	Purposeful sampling: The Revenue and Tax Policy Department is responsible for the drafting of the transfer pricing rules in Zimbabwe.	3 specialists	They are the relevant participants who are involved in the drafting of the transfer pricing legislation. According to Creswell (2014:239) qualitative studies are characterised by small sample sizes of between 3-10 respondents. The sample size was therefore sufficient to provide reliable results.
MNE/TCs	MNEs were purposefully included as they are the centre of the study. However, no reliable database currently exists of MNEs in Zimbabwe from which to select the desired respondents. Participants were identified from MNEs' Head Offices which were situated in Zimbabwe's three major cities; Harare, Bulawayo and Gweru.	Since there is no defined population as well as the sensitivity of the subject matter, the snowball sampling method was used to identify MNEs. Initially the study targeted 10 MNEs, who later referred the researcher to their tax consultants. Only those identified and willing to participate were recruited.	10 MNEs/ Tax Consultants	According to Creswell (2014:239) qualitative studies are characterised by small sample sizes of between 3-10 respondents. The sample size was therefore sufficient to provide reliable results.
		Document Review		
Legislation	2	Purposive sampling	2	The study focused on the Zimbabwean legislation that deals with transfer pricing.
International Guidelines	2	Purposive sampling	2	The study focused on the OECD transfer pricing guidelines and the United Nations transfer pricing guidelines.
Court cases	3	Purposive sampling	3	The transfer pricing case first published in Zimbabwe was identified and included in the study. Other additional cases were reviewed as they could provide valuable insight into the transfer pricing concerns in Zimbabwe.
Budget Statements	2	Purposive sampling	2	National budget statements were consulted to help assess the transfer pricing rules in Zimbabwe.

Source: Own Compilation

6.6 Methods: Data Gathering

In order to appraise the transfer pricing rules in Zimbabwe, both primary data sources and secondary data sources were utilized in the study as indicated above and as discussed below.

6.6.1 Document Review

A total of nine (9) documents (see Annexure 5) were reviewed to assist in reaching the conclusions of this study. Document review is a stronghold for policy-oriented research (Bowen, 2009). After identifying the relevant documents, the researcher started by selecting the units of analysis (for instance chapters, sections or paragraphs), as guided by the research objectives because of the impracticability of analysing long documents (Bowen, 2009) and its usefulness in identifying subtle differences (GAO, 1989).

However, primary data sources were also applied in this study to counteract the weaknesses inherent with the use of secondary data particularly not offering current and up-to-date information as supported by Owen (2014). Essentially the study used different data gathering tools (Ellingson, 2014:5) to check the integrity of the data, and to give a deeper understanding of the transfer pricing phenomenon. This strengthens the research findings (Saunders et al, 2009) and provides a foundation for informed conclusions regarding transfer pricing in Zimbabwe.

6.6.2 In-depth Interviews

Since qualitative methods provide an enhanced understanding of the transfer pricing problem, interviews were used and this allowed researcher-participant interaction (Brinkmann & Kvale, 2015). In-depth interviews (Hossein, 2015:61) were used in this study because they enhance understanding of intricate phenomena (Saunders et al, 2009) such as transfer pricing. They enabled the researcher to probe answers where the researcher wanted the interviewee to clarify their responses. Kothari (2004) believes this unlocks new dimensions of the research phenomenon. The interviews also enabled the collection of rich and detailed data which helped address the research objectives (Saunders et al, 2009). The interviews also enabled the collection of rich and detailed data which helped address the research objectives (Saunders et al, 2009). The use of in-depth interviews is imperative where interpretivist epistemologies are being applied as is the case in this study where it will be used to enhance the understanding of

the meanings that the participants ascribed (Saunders et al, 2009) to transfer pricing in Zimbabwe.

Interviews proved very useful as they allowed for the collection of rich data as opposed to the filling in of questionnaires. Saunders et al (2009) also believe that people in managerial positions prefer to be interviewed rather than complete a questionnaire which requires writing down their responses. The interviews gave the researcher flexibility, allowed the researcher to rephrase the question when it was misunderstood by the interviewee and allowed the researcher to assess the instrument after each interview. For example, more questions could be added in the next interview shedule where critical issues had emerged in the previous interview(s).

The interviews were face-to-face and audio recorded for post-interview referencing as well as data analysis. Audio recording permitted the researcher to concentrate more and listen carefully to the interviewee as well as observe the non-verbal cues (Saunders et al, 2009). The non-verbal cues helped the researcher to understand whether the interviewee understood what the researcher was talking about. The researcher was also note-taking simultaneously with the recording (where permitted) for back-up, as some interviewees were not comfortable with audio recording particularly the MNEs. Though Kvale and Brinkmann (2009) believe that note-taking motivates the interviewee to say more as it is associated with giving the impression that what they're saying is very important. Although the researcher did not obtain much information from the MNEs, substantial data was collected from their tax consultants (referred to by MNEs).

Given the objective of this study which was to assess the transfer pricing policy of Zimbabwe, questions were constructed to establish the following: Firstly, what do the current transfer pricing rules in Zimbabwe stipulate? Secondly, what comprises the transfer pricing strategies used by the MNEs? Thirdly, what is the applicability of international transfer pricing guidelines to Zimbabwe? Lastly, what are the views of the participants in relation to the power and capacity of the tax authority (ZIMRA) to detect and punish errant taxpayers? Studies centred on tax issues are usually considered as intimidating. Therefore, all questions, especially those for the MNEs, were drafted with sensitivity to mitigate potential intimidation. This was done following advice by Smith and Osborn (2007) that a good interview instrument should be gentle rather than explicit.

The interviews comprised of questions considered to help answer the research objectives. The interview items were stratified into current rules, current rule challenges, ZIMRA authority and capacity, transfer pricing strategies and international principles (as shown in Annexure 4) based on the guidelines below. The interview items were derived as explained in detail below:

- **Available transfer pricing guidelines** (OECD and UN guidelines and their applicability in Zimbabwe) – The answers to these questions were expected to address objective number 1 on the transfer pricing methods delineated by the OECD and the UN.
- **The transfer pricing rules in place** (the prescribed transfer pricing methods, documentation, Advance Pricing Agreements, penalties) – The answers to these questions were expected to help address objective number 2 (Zimbabwe rules) on laws and measures taken to regulate transfer pricing in Zimbabwe so that ultimately their effectiveness can be assessed. These questions were derived from the Zimbabwean Income Tax Act (Chapter 23:06) Section 98 and the 35th Schedule as it currently reads (see Chapter 5).
- **Transfer Pricing strategies** (the transfer pricing schemes used by MNEs to avoid tax, transfer pricing adjustments, and others) – The answers to these questions were expected to address objective 4 on transfer pricing strategies used by MNEs to manipulate transfer pricing rules. These questions were mainly drawn from Chapter 2 where McBarnet (2001) said the appropriateness and comprehensiveness of legislation should be considered in light of sophisticated schemes employed by taxpayers in a specific country.
- **Assessment of the transfer pricing rules** (participants' views on their implementation, their impact on tax avoidance/national revenue, their shortcomings, administrative capacity of ZIMRA, and others). The questions emerged from the main objective of assessing the effectiveness of the current transfer pricing rules in addressing tax avoidance. They were drawn mainly from the international guidelines (Chapter 4) and the best practices (Chapter 5) where the study was also expected to draw lessons from the other countries (objective 3) in order to make informed recommendations to improve transfer pricing policies and practices in Zimbabwe.

Similar questions were structured for all groups in order to check for consistency and conformability. The researcher had an interview guide (Annexure 4) which provided the

researcher with the basics or minimum areas to be covered as indicated by Howitt and Cramer (2011). It served as a checklist for the researcher, and helped ensure that all research objectives were covered in the interview questions to enable the accomplishment of the research objectives. The interview guide was divided into two sections (see Annexure 4) for all the groups. Section A provided respondents with specific questions to which they could respond in terms of factual and substantive areas of transfer pricing. The section required participants' factual responses to the more formal, legalistic and compliance requirements of the new rules to help assess these new rules. Section B allowed more time in the interview to discuss issues in a more open-ended and exploratory manner and for the participants to relate to any specific examples or experiences, narratives and views that would give deeper and richer data to add value to the topic under discussion. This created the opportunity to assess and improve, where necessary, the transfer pricing rules in Zimbabwe.

Though interviews have their own flaws (Brinkmann & Kvale, 2015), gathering data through in-depth interviews provided the richness and quality of data that was required to meet the objectives of the study. This was especially the case in respect of the Section B questions. Most participants gave very practical examples which added value to the conclusions of this study.

6.6.2.1 Interview Debriefing

The researcher initially conducted an interview debriefing with two respondents, one from ZIMRA and the other one from MNEs, in order to formatively evaluate the interview questions. This was undertaken to ensure that the research instruments were harmonised with the research objectives and in so doing minimise potential errors (Sreejesh, Mohapatra & Anusree, 2014) in the data gathering plan. It also allowed for sufficient time to rectify errors prior to conducting the research. Some questions were revised and others totally removed with new questions being added to ensure the instrument adequately captured the research objectives.

From this exercise, the researcher also discovered that MNEs accountants were not as receptive as expected. This could be either because of their limited knowledge of the subject or their fear of potential victimisation because of divulging sensitive information that could bring the company into disrepute. Where the targeted participant was not forthcoming, the

researcher regarded this as a withdrawal. Consistent with voluntary participation, the researcher chose not to pursue nor coerce participants. This was done to uphold research ethics and not stifle the research domain because of the sensitivity of the subject as suggested by Pollock (2012:1). As a consequence of this potential risk, the researcher relied on information from tax consultants (TCs). This meant an adjustment in the initial sampling strategy. Given the fact that the over-riding sampling strategy was purposive (namely purposefully to interview those who are able to respond to the research puzzle with in-depth knowledge), the inclusion of the TCs as part of the purposive sample again confirms good qualitative sampling norms. In most countries, including Zimbabwe, the TCs are the knowledge experts on the intricacies of transfer pricing (see Chapter 2).

In respect of ZIMRA, the researcher also established that officers who work from other stations or regional offices are not so conversant with the subject since all transfer pricing cases are handled by the head office. After revising the instruments as informed by the interview debriefing, the researcher gained confidence that the research instrument was now complete and conducted the actual data gathering process.

The researcher successfully interviewed ten (10) ZIMRA officials, three MOF specialists and seven tax consultants. The MNEs did not have any meaningful responses and as such the researcher had to rely on responses from tax consultants appointed by MNEs who were more than willing to participate in the research. Pollock (2012:1) hints that people may be willing to participate because of altruism, which is a desire to contribute to the social good. The researcher had an average of fifty (50) minutes per interview. Table 8 below provides a summary of the interviews conducted.

Table 8: Schedule of Interviews (including adjustment to include TCs)

INTERVIEWEE	Means of recording	Source Document	Consent Form
10 ZIMRA Officials	Audio-recorded	Refer to ZIMRA Interview 1-10	Signed
3 MOF Specialists	Audio-recorded	Refer to MOF Interview 1-3	Signed
7 TCs	Audio-recorded	Refer to TC Interview 1-7	Signed

Source: Own Compilation

Participants were given information sheets and consent forms to read and sign in order to acquaint them with the subject matter as well as observe ethical integrity. All the interviewees signed their consent forms as indicated above.

6.7 Methods - Data Analysis and Presentation

Qualitative data analysis involves defining, categorising, explaining and mapping qualitative data such as interview transcripts (Owen, 2014). Content analysis was used for its unobtrusiveness in studying sensitive research topics (Prasad, No date:2). To summarise the data analysis process in this study, Table 9 was created. The questions in the Table gave rise to the interview schedule (see Annexure 4).

Table 9: Levels of Analysis

Level	**Main Research Question**	**Method: Data Gathering**	**Method: Data Analysis**
Analytical	How can Zimbabwe best regulate MNEs cross-border transactions to minimise tax avoidance through transfer pricing without impeding FDI?	Literature review as a means to establish theoretical framework for the data, Document review, Interviews	Deductive and inductive Content Analysis
Level	**Sub-question**	**Method: Data Gathering**	**Method: Data Analysis**
Descriptive	1. What are the transfer pricing methods available according to the OECD and the UN?	Document review	Deductive and inductive Content Analysis
Analytical and Evaluative	2. How adequate are the Zimbabwe transfer pricing rules?	Literature review, Document review, Interviews	Interpretive analysis of the current transfer pricing legislation using the empirical themes of content analysis and reviewing them against other countries experiences
Descriptive	3. What are the transfer pricing experiences of other countries?	Document review	Deductive and inductive content analysis to draw lessons from other jurisdictions
Descriptive	4. What are the transfer pricing strategies used by MNEs to avoid tax through transfer pricing?	Literature review, Document review, Interviews	Deductive and inductive content analysis and reviews of court cases
Analytical	How can these findings influence transfer pricing policy and practice in the future?	Literature review, Document review, Interviews	Deductive and inductive reasoning: content analysis

Source: Own Compilation

Table 9 above describes the types of analysis used in this study. Content analysis was performed for textual data from both transcribed interviews and from document review. Below is a detailed explanation of the procedures that were followed during these analyses.

6.7.1 Content Analysis of Documents

Content analysis is defined as "a systematic means of arranging information into categories related to the fundamental questions of the research" (Prasad, No date: 2). Deductive and inductive content analysis served as the data analysis method. Deductive content analysis entails coding the data according to categories, while inductive content analysis involves classifying numerous words into smaller categories (Elo & Kyngas, 2008:109). The research process started with a preliminary framework based on existing literature and theories. According to Bryman and Burgess (1994) research processes are messy with the interaction between the empirical and conceptual globe while deduction and induction occur simultaneously.

Documents were voluminous and the researcher had to start by identifying relevant texts since the documents were not written for the purposes of this study. The researcher came up with themes central to the research objectives and created categories (Braun & Clarke, 2014:58). The researcher grouped the data to reduce the categories and eliminated irrelevant data. The categories were created to address the research objectives. The categories also informed the interview schedule that was used in this study (see Annexure 4). The findings of document review contributed to the rigour of the study.

6.7.2 Content Analysis of Interviews

As a policy oriented study, the research followed qualitative data analysis methods which were interpretive in nature. Consistent with the positionality of the researcher, and the ontological and epistemological assumptions of the study combined with the crystallisation approach, data was analysed qualitatively.

The researcher undertook two cycles of coding. During the first cycle of coding, the researcher undertook the coding autonomously and formed categories keeping the research questions in mind during the analysis process and looked for units of analysis that were relevant as suggested by Elo and Kyngas (2008:109). The researcher reviewed a number of analytical methods (Saldana, 2009; Friese, 2014) and positioned herself with Braun and Clarke (2014) as shown in the following steps and as systematised by ATLAS.ti 8™. The CAQDAS, ATLAS.ti 8™ was used to intensify rigour, integrate and manage data and to demonstrate transparency of analysis (Tummons, 2014; Leech & Onwuegbuzie, 2007:578). The ATLAS.ti 8™ software facilitated the recording and analysis of textual data allowing the

researcher to directly enter interview data as presented below. During the second cycle of coding, the assistance of the second coder to interweave the data with the theoretical perspectives that undergird the study, was secured. It entailed open-coding, grouping, categorising and capturing emerging themes as indicated by Nayar and Stanley (2015). Owen (2014) emphasises how coding is an interpretive act meant to facilitate progress from data gathering to data analysis. The researcher and second coder reviewed the codes and quotations, engaged in discussions and reached consensus (Barbour, 2001:1116) in line with recommendations by Braun and Clarke (2014) on the steps to follow. The steps initially applied are as follows:

(i) The researcher first created the project in the software. This was simple as ATLAS.ti 8™ proved to be a user-friendly software. The researcher, made sure that the documents were interviewee identity-free and simply named the transcripts TC1, TC2 and so on.

(ii) The researcher imported all primary data (transcripts) into the software. The researcher first conducted a process of finding relevant text in her data sets (interview transcripts).

(iii) The researcher created group codes/categories as guided by the research objectives. The group codes/categories were named and coded using a mix of deductive and inductive means (Cho & Lee, 2014:4). Interim coding was done based on Hossein (2015:60)'s "directed content analysis".

(iv) The researcher created open codes under each theme as guided by the data (Friese, 2014).

(v) The researcher repeatedly read the transcripts and began with relevant concepts (deductive analysis), but was flexible to allow new concepts to emerge (inductive analysis) (Yin, 2011). This was done with special attention to distinctive themes that helped to interpret the transfer pricing phenomenon (Hossein, 2015:60).

(vi) The researcher matched the codes with the data and created prefixes (Friese, 2014). This is the stage that the researcher made critical decisions independent of the software. The data was repeatedly read (Collins & Mulligan, 2014:10), contingencies explored, disagreeing evidence searched for, and competing explanations considered. Subsequently the researcher revisited the literature to place the interpretation in the bigger theoretical context as suggested by Meadows, Verdi and Crabtree (2003:988). During the process, the researcher determined the good or bad codes, and made

decisions regarding categories and sub-categories to minimise chances of getting into code swamp or too few items (Collins & Mulligan, 2014).

(vii) The researcher analysed the data which was guided by the research objectives. At this stage, the researcher looked at the coded data again particularly to check analogy with the research questions. Thereafter, the researcher ran the analysis and wrote down the findings and interpretation. As the analysis progressed, the interim codes were revised, similar codes merged, and new codes added to cover the data.

Unlike positivist lenses which claim singular truths, crystallisation embodied two methods namely; it allowed thick descriptions of the findings and gave room for multiple realities as indicated by Ellingson (2014:3). According to Meadows et al (2003:986) documents are static as they are written for a specific purpose other than the research conducted (Mogalakwe, 2006:222). Given this, the study crystallised the document review and interview analysis to achieve completion rather than confirmation (Tobin & Bergley, 2004:394). This allowed for a deeper understanding of the transfer pricing phenomenon (Stewart, Gapp, & Harwood (2017:6) within the qualitative interpretive paradigm. The subsequent steps applied are as follows:

(i) After signing a confidentiality agreement as per the ethics of the study, the second coder undertook an overview and the codes were discussed with the researcher (Barbour, 2001). The second coder is a practitioner expert in qualitative methodologies and has done second coding for many studies. This stage assisted the researcher in ensuring the dependability and credibility of data.

(ii) The researcher reached consensus with the second coder (Barbour, 2001:1116). After a detailed discussion, the researcher reached consensus with the second coder.

(iii) The researcher conducted theory coding as reviewed by the second coder. At first attempt, theoretical coding was difficult for the researcher, but after a couple of reviews by the second coder, the researcher then grasped the coding.

(iv) The researcher reached consensus with the second coder (Barbour 2001:1116).

After all the deliberations, the researcher and the second coder then reached a consensus, for which the data is presented in this study. The theoretical gap between legal rationality and implementation realities was analysed at length in Chapter 7. Meaningful data portions were identified, retrieved, isolated, grouped and regrouped for the purposes of analysis (Friese,

2014), from which conclusions were derived. The use of these methods above simplified, integrated and improved the rigour of the research process.

While it is generally accepted that there is no design without flaws, the qualitative inquiry greatly helped to attain the knowledge contributions of this study. Findings from both primary and secondary data analyses were presented, compared and interpreted in order to come up with a robust assessment of the transfer pricing regime in Zimbabwe. The final interview data presentation included the voices of participants, the reflexivity of the researcher and a description and interpretation of the problem (Creswell, 2014:45). The data was presented in tables and networks that were generated and imported from ATLAS.ti 8™. The visual aids (figures and tables - see Chapter 7), helped the researcher to identify patterns and predominant codes. The themes and codes that emerged from the transcripts were summarised in matrices. The data was interpreted and presented in two parts; 'thinking through objectives' and 'thinking with theory' (Mazzei & Jackson, 2012). This procedure assisted in clarifying the contextual positions that provoked the study as well as the theoretical perspectives that directed the study. Insights from the integration of these two mutual parts were used to describe and assess transfer pricing issues arising from the analysis in a coherent manner. It is anticipated that this will expand literature, inform policy and indicate a call for action.

6.8 Qualitative Methodological Norms

The process of crystallising secondary and primary data assisted to validate the results generated from the document review and interviews. Crystallisation of the data sources minimised the threats to trustworthiness such as respondent and researcher bias (Ellingson, 2009). The blending of document analysis with other methodologies was undertaken to substantiate the findings as supported by Bowen (2009:28). Member checks as suggested by Meadows et al (2003:988) were also undertaken with tax consultants and ZIMRA to validate the data. With respect to the latter, this was achieved by providing the ZIMRA management with the interview recordings for them to verify the raw data prior to transcription and analysis. The researcher also provided the tax consultants with the transcriptions of their interviews for them to verify the data. The researcher did not receive any negative feedback from the interviewees nor management. Table 10 summarises how the methodological norms were applied in this study.

Table 10: Methodological Norms (Moon et al, 2016)

Norm	Measures
Credibility	According to Moon et al (2016) credibility refers to whether the study measured what was intended. To ensure credibility the study applied crystallisation of methods, and employed interviews and a document review to corroborate the findings. The findings from interviews were audio-recorded, and the documents reviewed were stored for reference purposes. In-depth interviews also minimised researcher control.
Dependability	Dependability refers to consistency. To ensure dependability, the researcher clearly outlined the research design as well as the methodological limitations, and followed the research strategy. The engagement of the second coder helped resolve dependability issues. Member checks (Reilly, 2013) were also conducted to ensure transparency, provide an audit trail and to allow for changes.
Conformability	The ideas and experiences of the participants should be represented in the results of the study. The degree to which this occurs is referred to as conformability. Conformability is referred to as the objectivity and neutrality criterion. The role played by the second coder and her going through the transcriptions and data in ATLAS.ti 8™, also helped to minimise researcher bias. Member checks (Reilly, 2013) also allowed inconsistencies to be eliminated. The bias that comes with the use of purposive sampling cannot be overlooked, but to minimise the researcher bias the results were linked to the conclusions and audio-recordings kept for verification purposes. The use of snowball sampling also minimises researcher bias as the sampling phase was respondent-driven.
Transferability	Moon et al (2016) says transferability speaks to the ability of results to be extrapolated to other context. Purposive sampling was employed to identify information-rich participants and limit irrelevant data. However, the transferability of the data cannot be exaggerated as the study was limited to Zimbabwe. The findings are limited to making contributions, mainly, to transfer pricing of cross-border transactions by MNEs in a developing country, namely Zimbabwe. However, the methodological accounts provided for in this study can allow a similar study to be conducted, though limited by the subjectivity in interpretive research.

Source: Own Compilation

6.9 Ethical Considerations

Ethical considerations refer to moral choices affecting decisions, behaviour and principles (Greener, 2008). The researcher conducted this study with academic honesty, integrity and modesty. Before undertaking the field work, ethical clearance was sought from the University of South Africa's Ethical Committee. After ethical clearance was obtained from the university, approval to conduct the study was sought and obtained from the tax authority, ZIMRA (Annexure 1) and the relevant ministry, MOF (Annexure 2). Authority was also sought from the MNEs and the participating tax consultants, but the letters are not annexed for confidentiality reasons as part of the ethical requirements of the study.

After permission to have access to the participants was granted from the relevant organisations, information sheets were distributed to the target participants indicating the objective of the study, anticipated benefits as well as participant rights to withdraw. Signed consent forms were sought (see Annexure 3) and participants were informed of the nature of study, its purpose and how they were expected to participate (interviews), the rights of the participants, and assurances of anonymity and contact details of the researcher to allow participants to clarify any queries. All these were observed to fulfil the academic expectations and requirements even though Pollock (2012:3-4) argued that qualitative research is achieved through personal engagement and collaboration rather than a contractual relationship.

Interviews were only conducted with those who had agreed to participate and no one was coerced to participate. The study followed four ethical principles as discussed by Pollock (2012:2-6) to ensure no harm would befall the participants. A discussion of these principles is as follows.

6.9.1 Principle 1: Autonomy

The researcher respected the rights and dignity of research participants and all participants were advised of their option to withdraw from the research at any time without penalty or repercussions. The unwillingness to participate by some of the participants like the MNEs was considered as a withdrawal and respected by the researcher as encouraged by Cooper and Schindler (2008). Pollock (2012:7) also emphasised that the researcher should exercise judgement in qualitative research. The researcher did not attempt to coerce the MNEs that were not responsive, as participation was voluntary.

6.9.2 Principle 2: Beneficence

The researcher aimed to contribute to tax administration by influencing policy and improving transfer pricing practices in Zimbabwe by carrying out this study. The study was sponsor-free, and thus free from sponsor bias, and did not offer gifts or services to participants, but rather acknowledged the participants for their time and input. The administration of interviews did not result in any participant injuries, pain/physical/psychological problems/side-effects, persecution, stigmatisation/negative labelling, but normal discomfort was expected on the part of MNEs given that the study was centred on tax matters which are of a sensitive nature. The researcher sought to enlighten the taxpayers on what is expected, the tax authority on any system deficiencies and the MOF on any legislative gaps to come up with a robust transfer pricing system.

6.9.3 Principle 3: Non-maleficence

The researcher observed the confidentiality principle and did not publish any identifiable or personal information or any sensitive information that could be disclosed by participants. Private and confidential information was neither recorded nor printed in the study. The paper-based records were kept in a lockable shelf at the researcher’s house which would be accessible only to the researcher. The researcher blacked out names, and used pseudonyms like ZIMRA Interview 1 or MNE Interview 2 to number the transcripts, and kept a numbered list in a separate lockable location. Access passwords for computer-based records were only

available to the researcher. Data was encrypted to ensure security and it will be retained for five years. Thereafter, paper-based records will be completely destroyed by fire and computer based records will be deleted through the use of a relevant software programme in order to permanently de-identify personal information. Back up files will also be permanently deleted. Participants were assured of no harm or embarrassment (Saunders et al, 2009) as a result of this research. This has been assured through strict adherence to the confidentiality rule.

6.9.4 Principle 4: Justice

All relevant findings and results were presented as they have been provided for in the interviews. There was no falsification of information. ZIMRA investigations office management was given the recordings after the interviews to allow them to check if there was any material disclosure of information that should not be published. After completing the research, principal findings of the study would be distributed to participants by means of a written thesis accessible on the internet or by peer-reviewed journals (print and electronic).

6.10 Summary

The research design was outlined in this chapter explaining the research approach and research methods adopted. The study follows a qualitative interpretive research strategy to find solutions to the transfer pricing problem. The research method identified and explained the research participants, sampling technique, the research procedure and the research analysis undertaken. The study's research participants included MNEs in Zimbabwe, tax practitioners, the MOF and ZIMRA officials. In-depth interviews were used to collect primary data, and a document review was also conducted. Extensive efforts were made to ensure credibility, trustworthiness, consistency and conformity of the results and all ethical considerations were observed. Data analysis was performed using an established process, and assisted by qualitative data analysis software, ATLAS.ti 8™ as explained in chapter 7 below.

CHAPTER 7: DATA PRESENTATION AND ANALYSIS

"A tax loophole is something that benefits the other guy. If it benefits you, it is a tax reform" - Russell, B, Long

7.1 Introduction

The preceding chapter explored the transfer pricing rules of other jurisdictions in order to provide possible recommendations in respect of the Zimbabwean transfer pricing rules. Guided by both inductive and deductive processes, this chapter provides the presentation, interpretation and discussion of the results from both primary and secondary data analyses in order to answer the research objectives and to build towards the contribution to the body of knowledge created by this study.

This chapter addresses the data and interpretation thereof using two scholarly conventions:

- How does the researcher meet the research objectives of the study through the data and analysis?
- How does the researcher review the data through the lens of the theoretical and conceptual framework?

The researcher therefore has created two parts to this chapter in order to demonstrate the lines of argument around the research objectives (which were also reflected as questions) and then to review the lines of argument using the mid-range theory and the conceptual framework (refer to Figure 1 and 2 in Chapter 2).

The chapter is comprehensive in coverage and length because of this decision and is based on the plethora of data that qualitative research generates and that the researcher has analysed and interpreted (Hesse-Biber & Leavy, 2011). The researcher has orientated the research findings (this chapter) on the basis of the commitments set out in Chapter 1 (research objectives and research questions driving the study) and the theoretical gaps and propositions set out in Chapter 2 (attending to an extension of theory).

7.1.1 Overview of Approach to Presentation and Analysis of the Data

The data was interpreted as guided by the research problematisation, conceptual framework, and methodological choices that were discussed in Chapter 6. The researcher undertook various cycles of coding when analysing the information obtained from the interviews conducted with the MOF, ZIMRA and the MNEs/TCs as explained in the adjusted sampling strategy in Chapter 6, Sections 6.5 and 6.6. The transcripts were pre-coded and the data were reviewed based on Braun and Clarke's (2014:65) guidance. This meant getting to know the data and asking questions about 'what was going on in the data?' Thereafter, the researcher started on the formal coding process. The transcripts were categorised into document groups in ATLAS.ti 8™ (Annexure 6 – document groups). This enabled the three central perspectives to be analysed systematically through coding similar participants together and getting a sense of if, and how, the three groups differed. The first cycle of coding was done on the basis of what the researcher knew from the literature review and initially looked for patterns in line with the central concepts of transfer pricing and the central concepts of the relevant research objectives (objectives 1, 2 and 4) and ultimately the main research objective. This was descriptive coding which entailed giving a meaningful link to the text through assigning a code (Braun and Clarke, 2014:65).

Thereafter, the researcher focussed on more conceptual coding, reviewed the transcript and adopted a coding orientation that responded to more integrated concepts of the conceptual framework and the objectives. This is a form of structural coding (Saldana, 2009:66) as there is a more defined structure guiding the coding. The second coder reviewed a sample of these codes, held discussions with the researcher in which consensus was reached (Barbour 2001:1116). Thereafter the researcher refined the codes, generated an initial code book for the research objectives and 'themed' the data into seven themes (Braun and Clarke, 2014). The themes were then compared to the literature as well as the narratives under the relevant research objectives, which were written up as an analysis.

The researcher worked in a similar manner in the 'Thinking with theory' section. The second coder provided synergistic guidance in terms of orienting the theoretical coding process. The discussions between the second coder and the researcher (Barbour, 2001) ensured that agreement was reached. The researcher then aggregated the codes into themes that spoke more substantively to the theory (Braun and Clarke, 2014:70). Narrative exemplars of the

‘Thinking with theory’ section were then written up incorporating themes and aligning the themes to the literature (Braun and Clarke, 2014:67).

The Zimbabwean transfer pricing regime state of play (global objective/main research question) was thus assessed based on findings from the literature review, document review, in-depth interviews as well as theoretical underpinnings. The following reference system was used to report the qualitative data:
Example: ZIMRA 6 (as referred in Annexure 10), where:

- **ZIMRA** represents the ZIMRA Participants;
- **6** represents the ZIMRA participant being referred to; and
- Italics for the verbatim quotations where applicable.

7.1.2 Background Issues

The ultimate goal of this study has been to assess the effectiveness of the transfer pricing rules in Zimbabwe that regulate MNEs cross-border transactions in order to minimise tax avoidance through transfer pricing. To achieve the objectives of this study, in-depth interviews were conducted with three groups namely, ZIMRA, MOF and TCs (see Annexure 6 for the document groups). Findings showed that MNEs are abdicating the tax related responsibilities to technocrats who happen to be tax consultants. This was observed as the researcher failed to get information of substance from the MNEs. Some of the MNEs cancelled scheduled interviews belatedly, while other MNE respondents either did not know the responses to the questions or simply did not want to talk about the subject, and so ended up referring the researcher to their TCs. TCs therefore appear to represent the views of the MNEs regarding the transfer pricing regime in Zimbabwe as the MNEs referred the researcher to their tax consultants while the MOF also referred the researcher to ZIMRA for the bulk of the questions.

Notwithstanding the characteristics of qualitative methods, the researcher made use of supplementary matrices with numeric data (Tables 11 - 17). This provided clear evidence and simplified the comparisons amongst the participating groups, and helped identify patterns in the interview data. However, this was done without smothering the primary research objectives of employing qualitative tools to get rich and thick data from the selected participants (Brinkmann & Kvale, 2015). Hossein (2015:59) acknowledges that such a

practice may seem quantitative at first but its goal is to explore the manifest content in an inductive manner. It should also be noted that ethical issues underpinning qualitative studies were highly observed, as participation in this study was based on the willingness of the participants, their ability to provide the beseeched data and their freedom to withdraw at any stage of the data gathering process. Snowball sampling was applied to the MNEs and their tax consultants where the researcher was being referred to the MNE's tax practitioner. The researcher successfully interviewed ten ZIMRA officers and a sample of seven TCs was achieved. Three transfer pricing specialists were interviewed from the MOF while other staff members were said to be ignorant of the subject in question. Therefore, the dependability of the data was not based on numbers but rather on the depth of the data gathered.

For more rigorous data analysis and conclusions, document analysis was also employed using tax legislation, international transfer pricing guidelines, budget statements and court cases as the source of this review. Findings from the content analysis of both the documents and the interviews are integrated in this chapter. This chapter is stratified into two parts, with Part 1 being "Thinking through objectives" (interweaving data with the study objectives) and Part 2 being "Thinking with theory" (plugging theory with data).

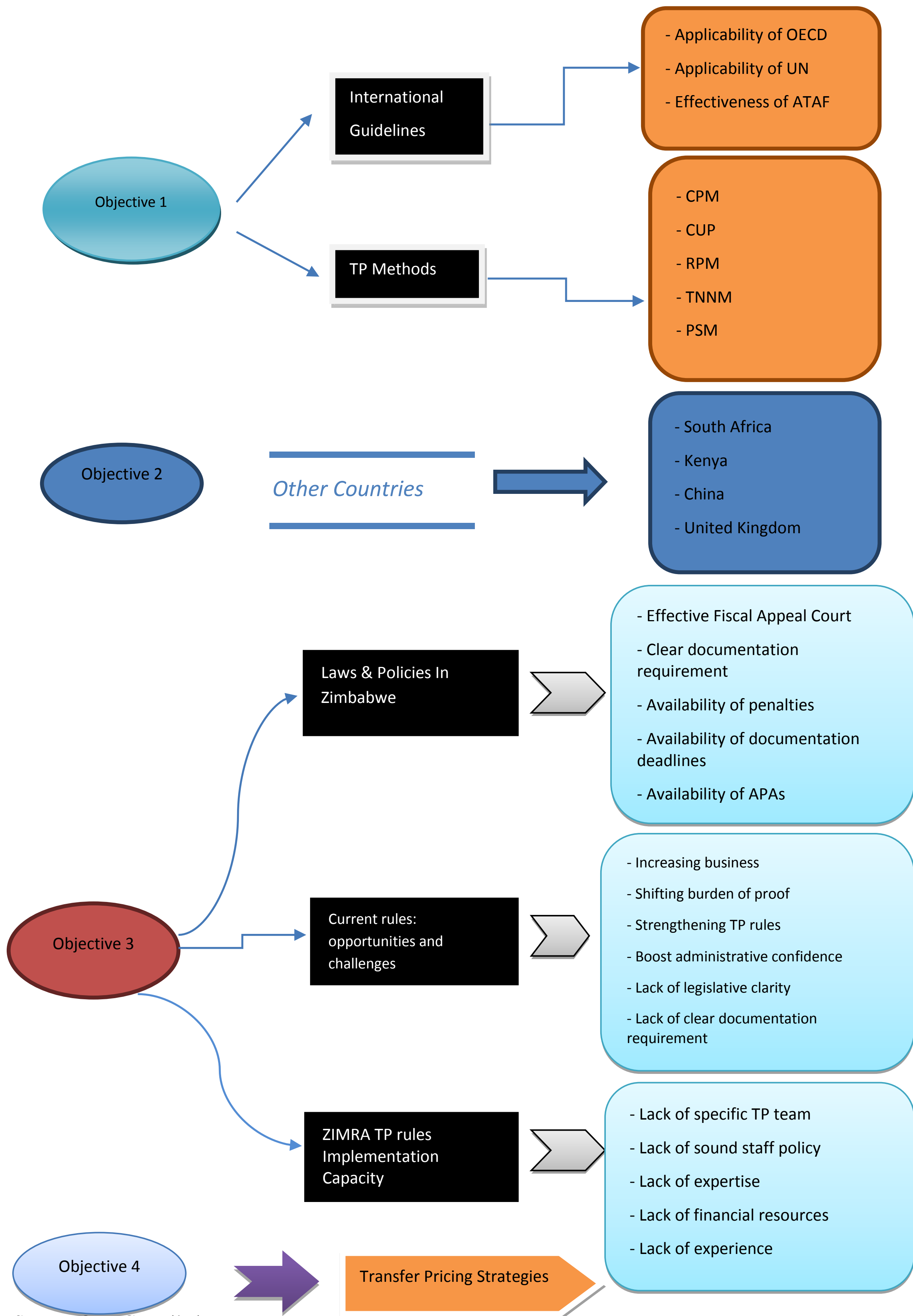
7.2 PART 1: THINKING THROUGH THE OBJECTIVES

The researcher's desire to align the study to the research objectives informed the unique title: "Thinking through objectives", and in this section the data from the interview and document analysis is interwoven with the study objectives and the data sources, with literature, influencing the themes.

In order to extract answers to the research questions, interviews were analysed as recommended by Pierre and Jackson (2014), when they uphold interviewing as a leading method of data gathering in qualitative research. The researcher audio recorded the interviews, transcribed them and then uploaded them on the ATLAS.ti 8™ software for integrated and systematic analysis. The interviews provided nuanced accounts of the interviewees, and the researcher initially started with six themes (deductive) which were informed by the research objectives. The seventh theme was based on other countries' experiences with transfer pricing. Fifty-six codes were used in the interview analysis. Through interactive coding and data reduction, the researcher closed the coding stage with fifty codes. The themes aggregated the codes with some renamed as the data revealed a

certain trend. To emphasise a point and to prevent dilution of data, direct quotes were extracted and recorded verbatim from some of the interviews. The results were then aligned with the research objectives and presented in Figure 3. The Figure integrates all the themes used in this chapter to address the research objectives.

Figure 3: Alignment of Themes to Research Objectives



Source: Own Compilation

Figure 3 above shows the study objectives and how the themes were informed by both the study objectives and the primary data. The representations in this Figure were used to discuss the findings that follow. In each case, an overview of the objective is provided. This is followed by a summary of the findings from the document review as well as the interviews. This section therefore links the objectives with the themes found in the data.

7.2 Objective 1: To Describe the Transfer Pricing Methods Outlined in the OECD and United Nations Guidelines

To answer this objective, questions were raised on the applicability of the OECD and UN transfer pricing guidelines as well as the methods being applied in Zimbabwe. As a result, this objective is addressed by two themes discussed below.

7.2.1 THEME 1: Applicability of International Transfer Pricing Guidelines to Zimbabwe

Through document analysis, the researcher discovered that the UN and the OECD have come up with transfer pricing guidelines and hence, respondents were asked about the applicability of these transnational agencies' guidelines to their circumstances. This was important in order to assess whether the Zimbabwean rules are not predisposed to international standards without being aligned to the demands of the local environment. The deficiencies experienced in applying international standards which, Oguttu (2016:18) postulates, may be inadequate to Africa's fight against BEPS, were uncovered through the document analysis. The comparison of the UN and OECD transfer pricing guidelines as an examination of their applicability to the Zimbabwean context has not been considered in previous academic research. Another body (African Tax Administration Forum, ATAF) emerged from the interview data, and shall be discussed as well.

The results of interviews on the applicability of international guidelines to Zimbabwe are shown in Table 11.

Table 11: International Transfer Pricing Guidelines

Participant strata	Applicability of OECD	Applicability of UN	Effectiveness of ATAF
TC (Yes)	100%	29%	0%
ZIMRA (Yes)	70%	40%	10%
MOF (Yes)	100%	67%	0%

Source: Own Compilation

The percentages in Table 11 depict the extent of usage of the transfer pricing guidelines by each participant strata. The data shows ZIMRA and TCs believe that the OECD is applicable to Zimbabwe with 70% and 100% indicating yes, respectively, while the UN had a 40% and 29% yes response, respectively. This is in line with the literature which has shown that most countries have adopted the OECD guidelines despite the UN guidelines being crafted specifically for the developing countries (see Section 4.4). According to ZIMRA6, *"We are not really tied to any but you'll see that we tilt more to the OECD"*. Similar to the ZIMRA officials, the tax consultants (TC1-7) indicated that the use of guidelines is a matter of preference and that since the OCED guidelines are more regularly updated, they are preferred. Levin and Milgrom (2004) refer to this decision-making as "rational", a process they describe as determining what options are available and thereafter choosing the most preferred.

The MOF indicated that there is no preference between the OECD and UN but they naturally refer to OECD since they get technical assistance from the OECD on transfer pricing. They added that the UN is relevant to developing countries because they cover some things which the OECD does not cover. Apart from the OECD and the UN, ATAF emerged from the interviews. ZIMRA suggested that ATAF should work on its own guidelines for the African continent.

Asked if there were any notable differences between the OECD and the UN guidelines, the majority of the respondents (TC1-6, ZIMRA1-10) acknowledged that the UN is based on the OECD guidelines and that there is substantial overlap between the OECD and the UN guidelines. However, many (both ZIMRA participants and TCs) professed that they have never used the UN guidelines. TCs expressed their frustration over the application of transfer pricing rules to domestic transactions yet the OECD guidelines do not cover such. This was confirmed by the literature of Taxmatrix (2016) which conceded that Zimbabwean rules cover both domestic and cross-border transactions. The TCs were advocating for a guideline, for example, on the thresholds of who is supposed to comply with the rules. The UN (2017) also recommends thresholds for documentation requirements. TCs objected to domestic transactions being subjected to transfer pricing when other countries are only subjected to cross-border transactions. That is the major difference between Zimbabwe and other countries. There is no consensus on the effects of this as Taxmatrix (2016) acknowledges that transfer pricing manipulation is very possible within the same country as two associated

enterprises can make arrangements to lower their overall tax burden. Oguttu (2006a:139), however, argues that there is a limited risk of tax avoidance in transfer pricing between related enterprises resident in one country.

In this study, the researcher was interested in understanding the applicability of the existing international guidelines to the Zimbabwean context. ZIMRA believed that the OECD guidelines were applicable but not in their entirety and they would need “tweaking”. ZIMRA explained that these guidelines were a product of the OECD countries which have a different environment to Zimbabwe. In this regard, developing countries are considered to be on the receiving end, while the developed countries stand to benefit the most from these guidelines (confirmed by Section 4.5.2 and echoed by Oguttu, 2016:9). The respondents also noted that Zimbabwe has very few MNEs (i.e. companies owned by Zimbabweans but operating in other countries) but rather more MNEs owned by developed countries operating in Zimbabwe. The dominance of foreign owned enterprises in Zimbabwe particularly in the mining sector was confirmed by Kwaramba, Mahonye and Mandishara (2016:53). Such a situation exposes the country to high risk of repatriation of profits.

The OECD has also been criticised for being voluminous and difficult to understand, and ZIMRA was urged to prepare a guideline in the lay man’s language (TC1-7). The OECD guidelines also appear to be more skewed towards the developed countries. These allegations are also alluded to by Baker and Mckenzie (2006) when they argue that the UN should not import OECD guidelines as these favour developed countries. ZIMRA further added that the OECD is not a “one size fits all” so one cannot assume that what applies in Australia applies to Zimbabwe. ZIMRA gave the example of management services where the OECD instructs the charging of the cost plus method while local taxpayers were charging percentage of sales which is incorrect as they have no relationship with the turnover, but the question is: “How do you arrive at cost plus for example when it is a company policy that the CEO spends time at subsidiary A and subsidiary B?” This is difficult because no-one is able to keep the records of how much cost is associated with such a transaction. Moreover, the unavailability of comparable local data leads to the use of foreign databases. TCs highlighted that though using foreign databases was permissible at law, it did not provide accurate results. They added that Zimbabwe could rely on OECD guidelines to a certain extent, but would need to be reviewed for their applicability, suitability and effectiveness which is why Zimbabwe also refers to the UN guidelines.

Most respondents from ZIMRA (2, 3, 4, 6, 7 and 9) acknowledged that the use of the OECD and UN guidelines is persuasive rather than authoritative/binding. Findings showed that more users are aligned to the OECD, but the local legislation takes precedence over the OECD and UN guidelines. Both ZIMRA and TCs agreed that Zimbabwe literally adopted the OECD guidelines and that while they are applicable, there could be grey areas that would need to be customised to the Zimbabwe situation rather than just taking a blue print from the OECD. To the contrary, TC1 felt the guidelines needed to be applied uniformly to prevent discrepancies since a MNE is resident both in Zimbabwe and outside of Zimbabwe. This concurs with Evers, Meier, and Spengel (2014) who advocates for the standardisation of transfer pricing rules at international level. Conclusively, while there is no consensus, substantial evidence shows that the OECD guidelines are being applied more than the UN guidelines.

7.2.2 THEME 2: Transfer Pricing Methods Applied in Zimbabwe

The question posed to the respondents with respect to the transfer pricing methods was as follows:

Of the five OECD methods (CUP, RPM, CPM, TNNM, PSM) which ones do you prefer and why? Have you had problems with applying any of these methods?

As a means of assessing the transfer pricing regime in Zimbabwe, the question sought to discover the transfer pricing methods applied by the respondents as well as to establish if there are any preferences. The methods mentioned above were selected on the basis that they are the ones prescribed by both the OECD and the UN. Information such as the expectations of the tax authority will help inform taxpayers on what methods are preferred. Knowing the challenges faced in applying these methods aided in finding ways of mitigating the same. The results are shown in Table 12.

Table 12: Transfer Pricing Methods Used by Participants

Participant strata	CPM	CUP	PSM	RPM	TNNM
TC (Yes)	57%	57%	0%	0%	43%
ZIMRA (Yes)	10%	40%	0%	0%	0%

Source: Own Compilation

ZIMRA selected CUP as the most applied method with 40% saying yes while cost plus followed with 10% saying yes they used this method and the rest were not mentioned. These findings confirmed that traditional transaction methods were preferred to transactional profit methods (Taxmatrix, 2016), and the respondents acknowledged that the CUP method was easy to apply because one would just be comparing information relating to similar products. 57% (4/7) of TCs expressed that they apply CPM and the CUP method the most, followed by 43% (3/7) applying TNMM, with 0% for the profit split and resale price method. They added that CPM is mainly applied to services even where one is supplying services to a third party. The application of CPM to services is in tandem with the UN (2013) guidelines. Some TCs indicated that they also apply TNNM when they struggle with the CUP and CPM. The CUP method and CPM seem to be applied the most, with many stressing that both the OECD and the Zimbabwean legislation favour the CUP method where all these traditional methods produce the same results. These findings confirmed the CUP method as the easy and preferred method to the other four methods in Zimbabwe as alluded to by Taxmatrix (2016). However, the CUP method is hugely affected by lack of external and internal comparable data. The rest of the methods seem to be a bit difficult, and their application should be based on whether they are the most appropriate in particular circumstances.

Though the other two methods were not mentioned, it was emphasised that the choice of method also depends on the product or service in question. Confirmation of limited or no use of the RPM supports Cools et al’s (2008) assertion that it is a one-sided method which is not always the most appropriate method to use. ZIMRA and TCs also seem to shun the profit split method which is consistent with the OECD’s (2010:95) assertions that its applicability is affected by limited access to information from foreign affiliates. It is important to note that the domestic law in Zimbabwe (35th schedule of the ITA) grants taxpayers the liberty to choose their method among the five transfer pricing methods, and restricts the Commissioner from applying a different method where the taxpayer has applied any of the OECD prescribed methods.

7.3 Objective 2: To Investigate Measures that Curtail Transfer Pricing Employed by Other Countries (i.e United Kingdom, South Africa, Kenya and China) and their Experiences of this Phenomenon

This objective was meant to assist in understanding how other countries have dealt with transfer pricing issues within their jurisdictions. This would enable Zimbabwe to draw

lessons from them, avoid the same mistakes made by these countries, and ultimately strengthen its transfer pricing rules. The selection of countries in this study was based on the major trading partners of Zimbabwe and some of the countries which form part of the BRICS countries. This has not been done in previous studies both theoretically and contextually.

7.3.1 THEME 3: Measures Employed by Selected Countries

Findings from both literature and interview data revealed that despite the inherent flaws of the OECD's arm's length principle, it is the most widely accepted model among the countries if compared to the UN's guidelines. While countries such as China and South Africa have enacted CbC reporting, Zimbabwe is lagging behind, yet this mechanism would enhance transparency in transfer pricing reporting by MNEs and allow ZIMRA to detect transfer pricing abuse better. Though, Zimbabwe's unique environment poses specific challenges to the tax authority and taxpayers, the country has so much to learn from these countries such as documentation requirements and interpretation notes (see Chapter 5).

The unique economic, political and social systems in Zimbabwe expose the government to unique challenges which require creative and practical solutions. Solutions to base erosion and profit shifting cannot be universal, and the evidence shows that most proposed solutions emanate from developed economies which carry different economic, political and social structures compared to African states, and as such having global standards to fix domesticated problems is rationally exploitative. Dharmapala (2014) describes this as the tug of war between global welfare and national welfare.

Despite this objective having been exclusively addressed in Chapter 5, the need for partnering and collegiality with other tax agencies and transnational agencies was evident in the empirical data (TC2, 4 and 5). The need for information sharing and transparency was emphasised and confirmed by Lohse and Riedel (2013). Therefore, examining the transfer pricing policies in other countries helped draw lessons for Zimbabwe and informed the conclusions to this study.

7.4 Objective 3: To Examine the Laws and Policy Measures in Zimbabwe that Regular Transfer Pricing

This objective was centred on the legislation and policies that Zimbabwe has put in place to regulate transfer pricing. To achieve this objective, (i) the laws and policy measures in

Zimbabwe were explored (ii) the opportunities and challenges faced with the current rules as well as (iii) the capacity of ZIMRA to effectively implement the rules were examined. The effectiveness of the transfer pricing laws and policies in Zimbabwe is critical as Sikka and Willmott (2010:30) mention that failure by governments/political processes to meet public demands threatens social stability and the state's survival. Literature has also shown that there is little or no research which considers this context extensively as is done in this study.

Faced by sophisticated tax avoidance strategies by MNEs, Holtzman and Nagel, (2014) indicate that governments revised their legislation by introducing significant penalties, new documentation requirements, and increased audit procedures. These were examined, and the rationale and extent to which the OECD and the UN guidelines have been adopted was also relevant and critical in determining the efficacy of the local rules.

7.4.1 THEME 4: Laws and Policy Measures in Zimbabwe

The MOF was asked what triggered the introduction of new rules. They indicated that the move from GAAR was a result of their ineffectiveness which was detrimental to the national revenue collections. This move reflects rational decision-making (Jukka, 2001) where they chose to adopt what gives them a higher payoff. Furthermore, the previous legislation (Section 98) made it technically and legally difficult for the Commissioner to ascertain transfer pricing abuse as well as making appropriate adjustments (other than just exercising his discretion). Hence, the respondents were asked to comment on the existence of provisions such as documentation requirements, penalties, Advance Pricing Agreements, and the effectiveness of the fiscal appeal court. Table 13 presents the results of the questions posed to the respondents on the transfer pricing laws and policies in Zimbabwe. The MOF referred the researcher to ZIMRA for most of the questions. ZIMRA acknowledged that it influences policy to a large extent as they make recommendations to the MOF to amend the legislation where they feel it is lacking.

Table 13: Laws and Policy Measure in Zimbabwe

	TC (Yes)	**ZIMRA (Yes)**
Availability of APAs	0%	10%
Clear Documentation Requirements	14%	10%
Availability of Deadlines	0%	20%
Availability of Penalties	14%	10%
Effective Fiscal Appeal Court	14%	0%

Source: Own Compilation

Each of these measures are discussed separately below.

7.4.1.1 Availability of APA Procedures in Zimbabwe

Having realised that other countries have adopted APA procedures to minimise disputes between taxpayers and the tax authority, the question posed to the interviewees sought to establish whether Zimbabwe provides for this. The results propose that according to ZIMRA, APAs were not included in the transfer pricing legislation as 90% gave an outright adverse response to the existence of APAs in Zimbabwe and 10% indicated a yes with uncertainty. The majority of ZIMRA officials confirmed that they have never invoked or applied APAs. Similarly, TCs concurred, with TC4 repeatedly saying *"there is really nothing like that"*. Both ZIMRA officers and TCs alluded to the benefits of APAs and failed to understand why they remain excluded from the local transfer pricing legislation.

Their non-existence could be because the MOF feels that APAs are another source of leakage (MOF2). The MOF indicated that they only had advance tax rulings. MOF1 argued that while APAs may be treated as a way of managing risk, they could be manipulated as the agreement is done before exchange rate adjustments, inflation adjustments and losses. They attributed this to the vast knowledge of the tax professionals who are familiar with ways of taking advantage of existing rules, and assist taxpayers in avoiding tax. The fear displayed here confirms Oguttu's (2017) assertion that often African tax authorities lack experience and expertise to administer APAs and thus are exposed to a high risk of being taken advantage of by the MNEs.

The confirmation of the absence of APAs in Zimbabwe also suggests that ZIMRA risks having multiple disputes with taxpayers (Oguttu, 2006b) and that the legislation lacks an important ingredient for a better transfer pricing regime. Having the taxpayer and the Revenue Authority agree on a transfer price in advance would mean that the price is at arm's length. This means that the price would be similar to what would be charged between independent enterprises which would also mean less tax avoidance.

7.4.1.2 Clarity of Documentation Requirements by ZIMRA

The new legislation (Section 98B of the ITA) places an obligation on companies with associate transactions to maintain documentation. A question was posed to the respondents to establish if the legislation was clear on what was expected from the taxpayers regarding

preparation, maintenance, and submission of the transfer pricing documentation. Knowing this would not only help to assess the adequacy of the rules but also help iron out ambiguity, speculations and varied interpretations and treatments of transfer pricing rules by taxpayers.

As shown in Table 13, the majority 9/10 (90%) of the ZIMRA respondents complained about the clarity of documentation requirements as contained in the Zimbabwean laws. They suggested that a guide or standard on the preparation of this documentation should be issued. Similarly, TCs 6/7 (86%) confirmed that section 98B of the ITA refers users to the 35th schedule for documentation requirements, but fails to provide specific guidelines on how the documentation can be generated.

A large percentage (86%) of the TCs expressed concern over the lack of documentation clarity and interpretation notes. They revealed that they had to rely on the OECD model which has a three-tier reporting requirement, that is, the local file, master file and then the CbC reporting. They further explained that for doing a master file they consult Annexure 1 of Chapter 5 of the OECD model and for the local file, there is also Annexure 2 of Chapter 5. They also indicated that they have not done the CbC reporting, because of the restriction that one's turnover must be about €750million. They explained that the CbC reporting is trying to get them to include in the financials, the transactions and operations they have in Zimbabwe and the other countries. They presumed that most companies would not qualify to do a CbC report because of the high threshold. However, countries such as South Africa signed a local CbC reporting regulation into law (see Chapter 5).

TC respondents from international accountancy firms added that they referred to South African documents as samples of transfer pricing documentation in order for them to prepare documentation for their clients. This corresponds with the concerns echoed by Tapera and Majachani (2017) when they stressed that the new rules are not supported by practice notes or compliance guidelines. One ZIMRA official (ZIMRA4) hinted that they were waiting for taxpayers to make submissions and then they would draft standard guidelines on the contents and structure they required based on those submissions. This emphasized the point by TC2 who repeatedly argued that, "*ZIMRA is not so sure on how to proceed*", and that some of the ZIMRA officers would consult with him on how to implement the rules. Shallow information leaves ZIMRA with no grounds to penalise the client for undetailed documentation unless the taxpayer totally fails to prepare any transfer pricing documentation. Failure by ZIMRA to

disclose the contents and structure requirements is hypocritical according to Brunsson (1993:7), in that they demand something from taxpayers which they themselves do not know how to prepare.

The question which came next was whether ZIMRA officials knew what to do with the documentation. One interviewee (TC2) submitted documentation to ZIMRA and ZIMRA replied acknowledging receipt and stating that it did not know what to do with it. However, most of the consultants revealed that because the law is not explicit; they urge their clients to comply by maintaining the documentation in case ZIMRA approaches them. Failure to produce such would be giving ZIMRA a reason to punish them.

It was interesting to note that TC6 indicated that documents prepared by TCs which ZIMRA require will be supplied, but their content does not contain the truth. The researcher deduced that the authenticity of the contents remains ZIMRA's job to verify. This is consistent with Brunsson's (1982:30) theoretical assumptions that sometimes unfavourable information is suppressed in rational decision-making. However, the presentation of false information purporting that it is a true representation of the organisation's position is embedded in the hypocrisy and impression management theory described by Elsbach and Sutton (1992) (see Section 2.5.2).

Conclusively, both ZIMRA and TCs concurred that the documentation requirements are not clear. In essence the legislation provides basically the principal position. Documentation preparation is tripartite according to Chapter V of OECD (2015), but ZIMRA does not specify whether the MNEs should maintain the local file, master file or the CbC report. Participants recommended enhanced documentation requirements, and are supported by Durst (2015a:12) for their augmentation of enforceability. However, he also warns against too many documentation requirements that are too voluminous and difficult for both the taxpayer to prepare and the tax authority to assess. These findings mean that though the legislation is not clear on the exact documentation requirements, failure to maintain proper documentation tends to disadvantage the taxpayer by exposing him to a high risk of scrutiny and possibly penalties.

7.4.1.3 Clarity of Deadlines for Submission of Transfer Pricing Documentation

It was also important to find out whether the submission deadlines for the transfer pricing documentation are clearly provided so as to minimise unnecessary taxpayer penalties and enhance tax administration by ZIMRA. Furthermore, Lohse and Riedel (2013:8) found reduced income shifting with strengthened transfer pricing documentation requirements.

A majority (80%) of ZIMRA officials confirmed that they do not have submission dates for transfer pricing documentation, and that they had been receiving many enquiries from clients pertaining to whether they have a template document and when they should be submitted. ZIMRA8 indicated that the legislation implies that taxpayers maintain contemporaneous documentation which can only be submitted after ZIMRA requests it. There was unanimous consensus among the TCs that no stipulated deadlines for the submission of transfer pricing documentation exist. It appears TCs encourage their clients to keep some sort of documentation should ZIMRA ever request it to avert penalties.

7.4.1.4 Availability of Specific Penalties that Apply to Transfer Pricing Abuse

The question was targeted at establishing the strength of the transfer pricing regime in Zimbabwe, since having clear penalties specific to transfer pricing abuse would strengthen the rules (Lohse & Riedel, 2013:8).

From Table 13 above, it can be noted that 90% of ZIMRA officers refuted that there are penalties specific to transfer pricing. Tax consultants (TC1-6) also opposed the existence of specific penalties. The lack of specific transfer pricing penalties was confirmed in Chapter 5, with the rest of the countries reviewed having penalties in place except for Zimbabwe. These findings are in tandem with the findings by Lohse (2012) which showed that only 27% of the 44 countries which they studied had specific transfer pricing penalties translating to 73% of the countries not having specific penalties. Taxmatrix (2016) confirmed that local Zimbabwean rules lack a separate penalty regime.

The researcher further probed if there is any punishment for non-compliance with the transfer pricing rules. Many ZIMRA officials (ZIMRA 1-9) highlighted that because of the absence of specific penalties, general or traditional penalties (Section 46 of the ITA which deals with additional tax) apply. They explained that under-declaration attracts 100% penalty for first offenders while those who are in the habit of committing the same offence get a 200%

penalty. ZIMRA also indicated that it has a penalty load model where taxpayers can get tax penalties waived. However, 10% of the ZIMRA officers criticised this saying this loading model is limited by a lot of subjectivity, leaving the penalty regime weak. The National Budget (2017) echoed that the penalty regime was too discretionary thereby promoting corruption between taxpayers and the ZIMRA officers.

TCs highlighted that some of their clients would ask them questions as to what penalties they would face if they failed to maintain the documentation. Their response was that no specific penalties were in place, but failure to have the documentation would give ZIMRA the liberty to uplift the values and charge them penalties as if you have done an underpayment/under-declaration. They added that ZIMRA could also use Section 81 (general offenses) whereby if a taxpayer fails to keep documentation as required by the Commissioner, he would be penalised apart from having his revenue raised or some expenses disallowed. TCs suggested that there is a need for specific penalties rather than generic penalties, while the Ministry of Finance (MOF1,2,3) simply acknowledged that ZIMRA has stringent penalties which are guided by the ordinary legislation.

The issue of construing transfer pricing together with other offences does not show the gravity of the revenue lost through transfer pricing. Lohse and Riedel (2013:8) emphasized this when they found that specific (e.g. for missing or incomplete transfer pricing documentation) rather than general penalties increased compliance with transfer pricing. Some of the respondents stressed that it is important to benchmark and fine-tune the penalty regime for practice to be in line with other countries. Other respondents believed that we are all in a global village and therefore steps to match what is practiced in other countries are warranted.

7.4.1.5 The Effectiveness of the Fiscal Appeal Court in Zimbabwe

In order to come up with a robust transfer pricing regime it would be critical to assess any possible gaps that could weaken the rules. Hence the researcher asked respondents about the effectiveness of the Fiscal Appeal Court and the availability of dispute resolution procedures.

Just like the penalties, ZIMRA confirmed that the dispute resolution procedures for transfer pricing disputes are the same as with the general procedures for any tax assessment disputes. ZIMRA itself acknowledged that the fiscal court is not effective with many respondents

(ZIMRA 1-9) citing that though the fiscal court is in existence, it was being limited by several factors as proved by multiple unresolved cases. TCs (TC1-7) echoed the same, expressing disgruntlement over pending court cases. Some of the challenges highlighted by TCs were that the court is understaffed with only one judge who is overwhelmed by work (deals with all kinds of taxes: income tax, transfer pricing tax, VAT cases and many others). Other TCs alluded to the fact that there have always been allegations that the court does not have a presiding judge who is well versed in taxation. One tax consultant (TC4) indicated that ZIMRA raised an assessment objecting to the price that a taxpayer had charged and the taxpayer disputed it and the case is still before the courts. The respondents concurred that delays in concluding transfer pricing cases was one area weakening the transfer pricing regime.The fiscal court backlogs are confirmed by the Zimbabwean transfer pricing case which was submitted in 2014 and only concluded in 2018 (CF Pvt Ltd v ZIMRA) (see Chapter 3). TCs also expressed concern over the demands of the law that the taxpayer has to pay the additional tax whether or not the case has been finalised (Section 69 of the Income Tax Act).

Though failure to conclude cases may seem more prejudicial to the taxpayers (with pending court cases), it also mars the chances of ZIMRA appraising its legislative and operational capacity in order to improve. TCs stressed that this situation is not peculiar to Zimbabwe alone, but is common in Africa, citing that there are not many transfer pricing cases except for the famous Unilever case of Kenya (2005). The legal implementation of the transfer pricing rules is affected by judges that have been said to be "panicking", overwhelmed and with lack of expertise as evidenced by backlogs in the fiscal court cases. This contradicts the assertion by Maya (2015:5) that the courts have power to decide on the taxpayer's compliance or non-compliance with the demands of the law.

The inefficiencies of the Fiscal Appeal Court highlighted by the respondents contradict the assertions by Bagchi et al (1995) that a tax administration system with a combination of an omniscient judge and an omniscient tax agency would address tax avoidance. According to the researcher, the fiscal court is the apex authority which should set precedence and become the source of law. Thus, delaying the conclusion of court cases does not only stifle legislative progress but also weakens tax administration and clouds taxpayer confidence in the tax system.

7.4.2 THEME 5: Current Rules - Opportunities and Challenges

In order to assess the adequacy of the transfer pricing rules, apart from knowing the provisions of the rules, it was also important to find out the challenges that are currently being faced by both taxpayers and the tax authority. Respondents were asked to comment on the opportunities and challenges that arise as a result of the new rules and the opportunities are discussed first in Table 14.

7.4.2.1 Opportunities

Table 14: Current Rules Opportunities

Participant Strata	Shifting Burden of Proof	Strengthening Transfer Pricing Rules	Boost Administrative Confidence	Increasing Business
TC (Yes)	0%	71%	0%	100%
ZIMRA (Yes)	100%	100%	90%	0%

Source: Own Compilation

The new rules have presented great opportunities, with ZIMRA applauding them for shifting the burden of proof and the strengthening of the transfer pricing rules. 90% of ZIMRA added that these rules had now boosted their confidence to go and face the taxpayers and challenge their transfer prices if they are not in tandem with the arm's length principle. 71% of the TCs acknowledged that the rules had strengthened the transfer pricing rules and all saluted them mainly for increased business as clients are trickling in for transfer pricing services. Tax consultants (TC1-TC7) professed that the new rules brought a niche for them a situation that has created significant volumes of work. This has led to the establishment of separate divisions specifically for transfer pricing. Though Collins and Mulligan (2014) stress that upskilling taxpayers on transfer pricing as well as acquiring licenses for software needed to assist in determining the transfer prices comes with costs, the TCs confirmed that the benefits of providing transfer pricing services to clients outweighs the costs.

ZIMRA officers also explained that the new rules were strengthening their endeavour to curb tax avoidance. They indicated this in comparison with the period where they had the anti-avoidance rules (Section 98) only where it was ZIMRA's responsibility to prove that a transaction done by a taxpayer was mainly to avoid, postpone or evade tax (or not at arm's

length) – it was a difficult task according to them. ZIMRA7 stated that Section 98A, which prescribes what is termed tax splitting of transactions done in stages by various enterprises, was introduced because of the weaknesses of Section 98 in 2014. However, the section later changed when the specific transfer pricing rules (Section 98B and the 35th Schedule) were issued in 2016. This was echoed by Tapera and Majachani (2017) when they emphasized the new rules provided a more objective approach in adjusting the transfer prices than the old rules which required the commissioner to exercise discretion. The next section considers the challenges that arise from the application of the transfer pricing rules.

7.4.2.2 Challenges

On the challenges side, the respondents stressed that the legislation was not yet watertight, and there is still a knowledge gap with regards to transfer pricing within ZIMRA as well as on the taxpayer's side. The other challenge that was cited was that Zimbabwe has a unique economic environment. For example, how its financial sector operates and how businesses have been conducting business poses difficulties in applying the rules universally. Guided by deductive coding the three main challenges that emerged are presented below.

Table 15: Current Rules Challenges

Participant strata	Lack of Databases	Lack of Clear Documentation Requirements	Lack of Legislative Clarity
TC (Yes)	71%	71%	100%
ZIMRA (Yes)	90%	60%	30%

Source: Own Compilation

Of all the challenges raised by both groups, three could be summarised as the major ones. The lack of databases was ranked by ZIMRA as the highest at 90%; followed by the lack of clear documentation requirements at 60%; and the lack of legislative clarity at 30%. To the contrary, 100% of the TCs regarded the latter namely the lack of legislative clarity as the biggest challenge which was followed by the lack of databases and lack of documentation clarity at 71% respectively. The disparity between the views of the two groups explains the difference in the challenges faced by each of them in the execution of their respective duties which are diametrical. As to why TCs have raised concerns over legislative inconsistences,

this could be a pointer towards legislative inadequacies, as they stressed that the local laws are not precise and simplified for the taxpayers. However, it is interesting to note that as much as ZIMRA claim to understand the legislative provisions, TCs refute this impression and claim that they know better than ZIMRA. A lack of clear documentation has earlier been alluded to and as such, only a lack of databases and a lack of legislative clarity will be discussed.

7.4.2.2.1 Lack of Databases

The findings show that finding comparable data in Zimbabwe is a big challenge. The problem of maintaining databases is not peculiar to Zimbabwe but rather to the bulk of developing countries. This was confirmed in Chapter 5 with all the African countries reviewed having no databases except for China in Asia and the UK in Europe. For the tax authority/taxpayer to effectively apply the OECD's prescribed transfer pricing methods, such as CUP, it proves difficult in the current set up. When further probed on how they were handling that, ZIMRA officers explained that they heavily rely on their counterpart, SARS, for comparable data. However, ZIMRA 10 emphasised that getting information from other tax authorities is costly and often time-consuming depending on the cooperativeness of the particular tax authority.

ZIMRA 1-4 indicated that finding comparable data is difficult in Zimbabwe because only one company may be dealing in that line of business. They added that most of the MNEs rely on European databases which ZIMRA officers argued present a different market with different economic conditions. Furthermore, because of this limitation, objecting to taxpayer's transfer prices has been difficult, and in most cases clients have dragged ZIMRA to court. ZIMRA 1-3 expressed that if they fail to get comparable data they conduct functional analysis to establish the rationale for performing the service with a subsidiary outside Zimbabwe. Therefore, failure to justify the transaction gives ZIMRA the grounds to invoke Section 98 to say the sole reason of this transaction was to postpone, avoid or evade tax.

TCs also stressed that accessing the databases is expensive for them as it requires subscription fees and other expenses. Only two consulting firms (TC1 and TC2) have managed to secure commercial databases such as the "Onesource" and "KT Mine", offered by Thompson & Reuters. International TCs do not have a database of their own but get data

from their firm's global database (Africa and India) with considerable information coming from their Indian databases. One consulting firm (TC2) indicated that they had to send a team to South Africa to get proper training on how to use the KT Mine. KT Mine is mainly used for benchmarking royalties and commissions while Onesource is used for other transactions. They indicated that they only apply KT Mine and Onesource when they have failed to get comparables locally.

7.4.2.2.2 Lack of Legislative Clarity

Given that there are new rules in place, it was important to establish the extent to which they are clear for all the stakeholders to avoid unnecessary administrative squabbles which are unproductive. One interviewee (ZIMRA4) said *"we wouldn't be having court cases if the legislation was clear"*. In spite of the new changes, ZIMRA believed taxpayers will always look for ways of circumventing the new laws, *"so we cannot say we have arrived but rather we need continuous improvement"* (ZIMRA3 and 4). In the words of ZIMRA 4, *"we are still crawling, and we could learn from our counterparts' mistakes and take advantage of them and copy from what they have done"*. ZIMRA7 had this to say, *"the legislation that has been introduced is sort of like half-baked, but at least if something is said to be half-baked it may eradicate hunger but at a small scale".* Of the countries reviewed in this thesis only Kenya and Zimbabwe have not provided interpretation guidelines for the public on the transfer pricing rules (see Chapter 5).

A lack of legislative clarity received fewer votes from ZIMRA because ZIMRA believed that the legislation was now clearer compared to the old regime which had general anti-avoidance measures. Similarly, the Ministry (MOF1-3) believed the rules are close to being adequate, but also emphasised that they would not relax, but continue looking at how to deter any identified loopholes. However, TCs stressed that transfer pricing legislation was difficult to understand because of its reference to the OECD as well as the language which was not simplified for a layman. Kirchler et al (2008) and Christensen and Kapoor (No date) emphasize the importance of legislation to protect national tax bases.

The researcher asked further the reasons why TCs believed that the legislation was not clear. Their responses are provided below.

(i) Inconsistencies between ALP and Thin Capitalization Rule

Unlike ZIMRA officers, TCs consider a lack of legislative clarity to be the biggest challenge of them all. They cited discrepancies arising from the inconsistent treatment of the thin capitalization rule. They explained that it was not clear as to what takes precedence between Section 16 (1)(q) (which restricts the debt to equity ratio to 3:1) and the arm's length principle. ZIMRA argues that the thin capitalization rule is in the principal Act unlike the transfer pricing rule which is a subsidiary legislation because it refers to the 35th Schedule. They further state that the thin capitalization ratio of 3:1 complements the transfer pricing rules, and the section on 3:1 is actually saying that "notwithstanding any provision in any other section", and in light of that the thin capitalization rule would prevail.

ZIMRA emphasises that there is a need to have the debt capped because the cost of the debt will suppress taxable income since the finance charge is tax deductible. The excess portion of the interest is regarded as a dividend and is taxed. If they do not disallow the excess it will erode their tax base with a lot of interest being paid out of the country probably to a tax haven country or other jurisdiction with favourable tax rates. To the contrary, these fixed debt to equity ratios are discouraged by paragraph 17 of the OECD guidelines for its inflexibility. However, in terms of revenue, ZIMRA loses if the new rules (ALP) are applied, and MNEs win because the interest that they used to disallow (which is above 3:1) will be lost. ZIMRA does this to fulfil the intention of the law and to make sure that the state is not unnecessarily prejudiced.

However, TCs argue that they would have done their benchmarking and aligned the prices to an arm's length amount. They add that putting a cap on what arm's length/independent enterprises would do makes no sense and so they should leave the market to operate freely. ZIMRA further adds that some MNEs are unscrupulous, given that at the end of the year they shift the date of the debt to the next period since the legislation was not clear on when to recognise the debt to equity ratio or they simply inflate the equity values. Considering that Zimbabwe's transfer pricing rules were recently introduced, there is a high probability of ambiguities which require improvement to minimise multiple interpretations. This is a contradictory world that feeds into the politics and not the action of good governance which Brunsson (1982:37) advocates. Brunsson (1982:43) expands on how ambiguity may be

exploited for political ends. Tax consultants also have challenges with domestic transfer pricing which will be discussed next.

(ii) Inconsistencies as a Result of Domestic Transfer Pricing

Compared to other tax jurisdictions, ZIMRA can legally apply transfer pricing adjustments to domestic transactions. Tax consultants (TC1-6) expressed concern over the application of transfer pricing rules to domestic transactions which the OECD is silent about. They alluded to the assumption that transfer pricing rules target foreign enterprises, but the bulk of their clients approaching them are those that do in-country transfer pricing, while inquiries from MNEs are few. The existence of non-compliant MNEs also suggests evidence of free-riders which Ekstrom et al (2014:56) describe as social actors who take advantage of others and discourage the compliant firms. TCs question the reason for the rules to apply to domestic transactions, arguing that no significant differences exist since the tax rate is the same, and the conditions are the same. Oguttu (2006a:139) concurs and notes that the revenue leakages through such transactions are minimal.

TCs acknowledged that this requirement is burdensome particularly to the taxpayers because (i) consulting tax consultants is expensive and (ii) more often than not the comparables are not available because the enterprises are too small. TC2 added that the documentation is a costly requirement making reference to one of their clients; a financial institution with seven subsidiaries which they charged about $200,000 for documentation. Jones, Temouri and Cobham (2018) found evidence of large sums of fees being paid to the big four accountancy firms to develop abusive tax strategies. However, the UN (2017) believes both developed and developing countries need to have domestic transfer pricing rules that counter transfer pricing manipulation and eliminate double taxation due to transfer pricing adjustments.

TCs advocated for thresholds to be set for those who should comply just like it is done for Value-Added Tax (VAT). This is meant to exonerate very small enterprises from complying with the transfer pricing documentation requirements. TC6 said, *"Imagine an entity with a revenue of a hundred thousand dollars to do a transfer pricing documentation maybe would cost them $20 000 then it is unjustified."* Saunders-Scott (2013) also established that increased transfer pricing regulation is associated with significant compliance costs for the

taxpayer. Compliance costs of taxpayers are not affected by the tax law alone, but also by its enforcement through the tax authorities (Eichfelder & Kegels, 2012:18).

The rationality of Zimbabwe burdening small firms with compliance costs against limited administrative capacities is exploitative. Ordinarily the aspect of paying tax should be just and fair (canons of good tax system) (Tapera & Majachani, 2017). Although it may be driven by the country's hunger to protect its shrunken tax base and eliminate poverty since many Zimbabweans are living below the poverty datum line, this measure may cause disinvestment (both domestic and foreign). Such a situation would be unhealthy for an economy which is grappling with a plethora of economic hardships such as high unemployment rates and negative balance of payments. TCs (5-7) were not supportive of this decision arguing that it is contrary to the "Zimbabwe pro-investment, mantra" by the current President of the Republic as it overburdens the local business enterprises. Zimbabwe's decision to go beyond the standards of international law has legal and/or implementation rationality implications. The legal rationality is affected by the local context where the local legislation takes precedence over the international transfer pricing guidelines.

Having identified the legislative capacity and the challenges posed by the current rules, it was imperative to inquire on the ability of ZIMRA to tackle transfer pricing concerns.

7.4.3 THEME 6: ZIMRA Implementation Capacity

Kirchler, Hoezl and Wahl (2008:212) suggest that the effectiveness of revenue authorities highly depends on the tax legislation, the budget allocated to them by government, the transfer pricing knowledge levels of the officers, the experience and the skills of the personnel. The respondents were thus asked about ZIMRA's capacity and ability to implement the rules effectively. The questions were centred on administrative issues such as financial resources, experience and policies within ZIMRA.

ZIMRA alluded to the fact that they employ both deterrent and persuasive measures interchangeably depending on individual cases, a decision which is highly discretionary and according to Scott (2000) reflects rational decision-making behaviour which is concretized by Feld and Frey (2002). Table 16 shows ZIMRA's capacity to implement the new transfer pricing rules as perceived by the respondents. The Table shows the codes supported by the

ZIMRA implementation capacity category as informed by primary data and the theoretical foundations.

Despite the results shown in Table 16 below, the MOF believes ZIMRA has implementation capacity since they do a lot of training with various organisations at a regional level (such as SADC) and at a global level.

Table 16: ZIMRA Implementation Capacity

Implementation Capacity	TC (Yes)	ZIMRA (Yes)
Lack of Experience	14%	50%
Lack of Financial Resources	14%	40%
Lack of Expertise	71%	30%
Lack of Sound Staffing Policy	57%	30%
Lack of Specific Transfer Pricing Team	14%	30%

Source: Own Compilation

A lack of experience was highlighted by 50% of the ZIMRA respondents followed by a lack of financial resources at 40% while lack of expertise, sound policy and transfer pricing teams were tied at 30%. TCs believe ZIMRA lacks expertise the most as indicated by 71% of the respondents, followed by a lack of sound staffing policy at 57%, and then a lack of experience, finance and specific transfer pricing team being the lowest at 14% respectively. All these administrative issues are important, but for emphasis only experience and financial resources, expertise and sound staffing policy will be discussed.

7.4.3.1 Experience and Financial Resources

Half of ZIMRA officers argue that ZIMRA is incapacitated by a lack of experience because the subject is still new, and many officers have not experienced much regarding transfer pricing by MNEs. TCs concurred that ZIMRA personnel need to embark on work related learning with countries that have embraced transfer pricing earlier, for example South Africa. They emphasised that they should collaborate with the South African tax authority and carry out joint audits. TCs added that on the ground, ZIMRA has mostly new trainees and it takes time for them to be moulded into experienced staff.

ZIMRA concurred that it would be good to send teams to the countries where ZIMRA has disputes such as Dubai and China, but in most cases the resources are not permitting to

undertake such a mission. ZIMRA (3, 5, 7, 10) alluded to the fact that they face financial constraints particularly because transfer pricing is an area that involves collaborations with other tax jurisdictions, an exercise that is not easy or cheap. TCs (2, 3) alluded to the misplaced priorities by higher authorities who are involved in unscrupulous activities (such as fraud and bribes) which drain the fiscus.

7.4.3.2 Expertise

Expertise is a critical ingredient for a successful transfer pricing administration since (Saunders-Scott, 2013) found less profit-shifting from a country with skilled tax agents than where the tax authority has limited resources. It is therefore of concern that the lack of expertise was the highest with 71% of TCs claiming that they knew better than the ZIMRA officers. International accountancy firms indicated that they enrolled with institutes in the UK and specialised in transfer pricing. TC2 stressed that some of the ZIMRA officers consult him on how to handle certain cases. Though most TCs stressed that knowledge and skills were lacking in ZIMRA, they admitted that ZIMRA is making an effort to train their staff. *"It is a learning curve"*, TCs (5, 7) echoed.

Primary data revealed that ZIMRA has not been active in transfer pricing audits, and this may be a sign of lack of expertise. This is despite previous studies (Marques & Pinho, 2016; Beer & Loeprick, 2013:18 and Lohse et al, 2013) having found suppressed profit shifting after increased tightening of transfer pricing rules. Certain TCs (5 and 7) even said most of the ZIMRA officers are trainees who often exhibit lack of knowledge and skills. Others expressed concern over the time taken (as long as 3-4 months) by ZIMRA to respond to client queries which they indicated confirmed that they were oblivious of how the transfer pricing legislation is to be applied. TC6 stressed that ZIMRA lacked expertise to scrutinise mining transactions and validate the losses claimed by mining enterprises. He explained that mining operations require a high level of expertise which ZIMRA lacks because its employees are accountants and economists who know nothing about geophysical and geological movements. High transfer pricing risks in the mining sector were also identified by Kwaramba, Mahonye and Mandishara (2016:51).

The findings reveal that ZIMRA is making efforts to build its capacity through training activities, thus, taking heed of Brunsson's warning (1993:2) in his rationality theory assumptions that if an organisation fails to train its staff it would be limited.

7.4.3.3 Sound Staffing Policy

All the ZIMRA officers conceded that the staffing policies within ZIMRA support transfer pricing activities. To the contrary, 57% of the TCs believe that ZIMRA policies are not supportive as these policies are not sound. They highlighted that ZIMRA's training came to naught because of frequent internal staff transfers and high staff turnover. Collins and Mulligan (2014:18) also found that tax authorities are constrained by problems of up skilling their staff on the intricacies of transfer pricing and losing them to accountancy firms. Regarding retention of specialised tax officers, Oguttu (2016:19) stressed that tax authorities need to adopt policies that align salaries with those paid in the private sector.

Staffing issues such as having mostly trainees on the ground and having multiple human capital movements are not supportive policies. They advocated for specialisation rather than multi-skilling since transfer pricing is a complex issue which requires undivided attention. However, ZIMRA4 denied these allegations arguing that the personnel assigned specifically in the investigations department are not moved. A TC (TC3) added that having a long tenure of office with a Commissioner General in an acting capacity (for instance more than three years) alone stalls progress. TCs expressed their doubt over the ability of ZIMRA to dissect transactions and come up with informed positions. ZIMRA was castigated for its approaches which are reactive rather than proactive thereby discouraging voluntary compliance (TC3). This was also blamed on management which is not properly seated with most of them in acting capacities.

ZIMRA also noted with concern that the department that deals with transfer pricing issues is housed at head office only, which is a huge limitation when it comes to executing transfer pricing issues at regional level. They indicated that this limitation promoted unfair treatment. ZIMRA2 gave an example of a case where a taxpayer received a clean audit three/four times from Bulawayo/Gweru officers. Then only when Investigations officers from Harare came did they unearthed transfer pricing issues, and the client started protesting against that, arguing that these had not been uncovered in the previous audits. ZIMRA just shrugs this off on the basis that the Commissioner makes mistakes and is allowed to correct himself. ZIMRA suggested that there is need for the regional auditors to be capacitated for transfer pricing purposes to eliminate these inconsistencies.

Combining results from laws and policy measures, current rules-based opportunities/challenges and ZIMRA's capacity helped assess the current transfer pricing regime in Zimbabwe with a view to inform policy, taxpayers and tax authorities. The study tried to bring a balanced view by considering the administrative capacity of ZIMRA as well as the legislative capacity in order to draw a balanced assessment. Legislative capacity refers to legislative powers that ZIMRA can exercise as provided for in the Acts of Parliament. It can be concluded that the new transfer pricing rules introduced in Zimbabwe are a good start though there is and will always be room for improvement as MNEs continue to strategise ways of circumventing tax as discussed in the next section.

7.5 Objective 4: To Examine the Nature and Types of Transfer Pricing Strategies Utilised among MNEs in Zimbabwe

Understanding the nature and types of transfer pricing strategies used by MNEs in Zimbabwe was important to consider in order to be able to influence policy and to ensure administrative effectiveness, since "one cannot attack an enemy that he/she does not know". This aligns with McBarnet's (2001) viewpoint where he proposes that appropriateness and comprehensiveness of legislation should be considered in light of the sophistication and "creative non-compliance" schemes employed by taxpayers in the specific country. Sikka and Willmott (2010:7) espoused that MNEs direct their attention to transfer pricing strategies that minimise taxes in order to achieve higher shareholder value, and executive rewards. In this regard, respondents were asked what strategies are used by MNEs to avoid tax through transfer pricing.

7.5.1 THEME 7: Transfer Pricing Strategies

Ten transfer pricing strategies, believed to be used by MNEs in Zimbabwe to minimise their tax obligations with regard to transfer pricing, emerged from the interviews. These strategies confirm Ruiz and Romero (2011) list of strategies associated with cross-border trade, which include over/under-invoicing, thin capitalization, misclassification of goods and the use of tax havens. The results from ZIMRA and the tax consultants are presented in Table 17 overleaf. It should be noted that the percentages do not represent the actual proportion of usage of these strategies but rather the extent to which they are believed to be used by the respective groups.

Table 17: Transfer Pricing Strategies

Strategy	TC (Yes)	ZIMRA (Yes)
Use of Services	57%	70%
Over-invoicing	43%	60%
Under-invoicing	14%	30%
Thin Capitalisation	14%	40%
Tax Havens	14%	30%
Low Tax Jurisdiction	14%	20%
Treaty Shopping	0%	40%
Re-invoicing	0%	10%
Tax Incentives	14%	20%
Profit Shifting	43%	40%

Source: Own Compilation

From a ZIMRA perspective, the use of services (inflating management fees for services supplied to the subsidiary in Zimbabwe) emerged as the most widely used strategy (70%) followed by over-invoicing (60%) with thin-capitalization, treaty shopping and profit shifting all at 40%, as the most leading transfer pricing strategies used in Zimbabwe. Treaty shopping (attaining unwarranted treaty benefits), under-invoicing and tax havens also followed at 30%, while tax incentives, had 20% together with low tax jurisdiction, and lastly re-invoicing was at 10%.

From a tax consultants' perspective, the use of services is also the highest with 57%, followed by over-invoicing and profit shifting at 43%, while under-invoicing, thin capitalization, tax havens, tax incentives and low tax jurisdiction was at 14%. Re-invoicing, and treaty shopping were not considered by TCs to be used at all by MNEs as schemes to minimise their tax obligations with regard to transfer pricing. Although all the strategies are important, one may find that some of the strategies overlap and one strategy is not used in isolation (see Schindler and Schjelderup, 2013:3). For the sake of emphasis, only use of services, over/under-invoicing, thin capitalization and tax havens will be discussed.

7.5.1.1 Use of Services

The code, "use of services", means the use of administrative, technical and managerial services to manipulate transfer prices. Almost every respondent, including the Ministry of Finance (TC1-7, ZIMRA1-10 and MOF3), had something to say about the use of services. Apparently abuse is experienced mainly with management services which include marketing

services, IT services, and consultancy services. All of the three groups indicated that the use of management fees was the dominant strategy used by subsidiary companies that pay their parent companies management fees which are not commensurate to the work done. Others (ZIMRA6, 7 and 8) highlighted that some of the services claimed would never have been rendered. They explained that the scheme inflates expenses in Zimbabwe so that the taxable income in Zimbabwe is low. This results in the fees income transferred to the parent to be taxed either at a low rate or zero tax depending on the jurisdiction of the parent company. For example, ZIMRA7 indicated that a subsidiary in Zimbabwe will be claiming that they received training from their parent company (outside the country) yet nobody came to train them. This is contrary to Section 15(2)(a) of the ITA which requires that the expense should have been incurred. ZIMRA added that it will be difficult for ZIMRA to prove that there was no training, and a good comparative for such a transaction is also difficult to find.

The Ministry respondents revealed that they mainly suspect the mining sector as the haven for transfer pricing manipulation through abuse of services. They wondered whether some fees claimed by these companies will be reasonable, questioning the kind of service that would have been performed for a value of $10million. High risk of transfer pricing abuse by the mining sector was also confirmed in Section 3.2.4 of Chapter 3.

Abuse of services may also occur through selling processes where procurement is done by foreign enterprises that inflate the mark-ups when they sell to Zimbabwe. An example that was given is, a parent company (outside Zimbabwe) that will claim that they are charging their subsidiary (in Zimbabwe) management fees of 5% of turnover. ZIMRA argued that the charging of fees based on turnover instead of cost is wrong, and the OECD recommends the cost plus method. Similarly, TCs confirmed that the charging of a percentage of turnover instead of cost by MNEs is one of the biggest transfer pricing schemes in Zimbabwe. They explained that associated enterprises pass on items like royalties, patents (intangible property) and audit fees incurred outside Zimbabwe to their Zimbabwean firm.

According to the findings, MNEs are deliberately choosing use of services over other strategies which confirm observations by Scott (2000:3) that taxpayers are social actors which engage in deliberate calculative strategies that give them minimum tax payments.

7.5.1.2 Over/Under-invoicing

Over-invoicing also proved to be a major challenge with MNEs inflating imports and expenses. Over-pricing of services especially management services offered to subsidiaries outside Zimbabwe results in erosion of the tax base. ZIMRA emphasised that if a subsidiary is purchasing goods from a holding company, there is an aspect of over-invoicing by the holding company so that money can be transferred to their country of residence. Just like ZIMRA, TCs chose over-invoicing as the second most used transfer pricing strategy.

The mining sector has been identified as a high risk area with under-pricing activities especially where the mining company does the extractions in Zimbabwe and the processing is done by a parent outside Zimbabwe. They usually under-price the mineral and would then over-price the processing charges from outside Zimbabwe and that negatively affects the country's revenue. The high transfer pricing risk in the mining sector has been alluded to by Kwaramba et al (2016:51). It can be deduced that over-invoicing and under-invoicing generally happens simultaneously with one over-pricing or under-pricing the service or the goods depending on where they want them to be taxed and where they will benefit more. This finding is consistent with a report by GIZ (2010:20) which suggests that much transfer pricing abuse occurs through over-invoicing and under-invoicing of cross-border transactions.

7.5.1.3 Thin Capitalization

Thin capitalization is where a company is excessively financed by debt rather than by equity in order to take advantage of the tax deduction that comes with the interest payments. The ZIMRA officers 3, 5, 6, 9 acknowledged that they frequently encounter thinly capitalized companies where the local company pays excessive amounts of interest to foreign companies. They emphasised that the interest will be charged at artificially high rates which will suppress the taxable income locally. The OECD (2015) describes debt shifting as the easiest means of tax avoidance by MNEs, which gives MNEs a competitive advantage over domestic business.

An example that was given by ZIMRA is that of where an enterprise from Mauritius that has a subsidiary in Zimbabwe, wants to charge interest on a loan (from parent to subsidiary) but they know that they have some restrictions because of section 16 (1)(q). In order to avoid these restrictions (disallowing of the excess) a holding company would give the money to a bank and instruct the bank to forward the money to a subsidiary company in Zimbabwe. They

instruct the bank the rate of interest should be 20%. Ultimately, when the subsidiary uses the money they pay the interest to the bank and the bank then remits the money back to the holding company. In this process, the bank is just a conduit which will send the money to the holding company so the revenue authorities will not pick it up as they would just think it is a bank loan. This strategy is said to be prevalent in Zimbabwe, and was confirmed in Section 3.3.2 of Chapter 3.

Thin capitalization was third along with other strategies as the TCs confirmed that MNEs provide each other with interest free loans for the financing transactions or pay expenses on behalf of each other. An example is where company A is supposed to report a profit of $100k but the profit is reduced by incurring expenses on behalf of another subsidiary. Such a transaction is unlikely in an uncontrolled transaction as no one would be willing to pay for something on behalf of another company without getting anything in return for it. The findings show that thin capitalization fixed ratios are encouraged by BEPS, but the OECD (2015) acknowledged that they are subject to manipulation. Oguttu (2017:41) encourages levying withholding taxes on interest rather than fixed ratios.

7.5.1.4 Tax Havens

Tax havens are jurisdictions with relatively favourable tax rates, zero tax and/or weak tax administration systems. ZIMRA1 reported that the manipulation of pricing of service fees, such as consultancy fees, would mainly be used by local companies which have other associated companies in these tax haven countries (such as Jersey, Barbados, Isle of Man). Article 4 of the OECD guidelines (D3) mentions “place of residence” in terms of companies and individuals which is referred to as the tie-breaker rule. An example of how this guideline is abused is as follows: There is a holding company in Malaysia (with no factory, but just offices) and there is a subsidiary in Zimbabwe (with a factory). Malaysia is well known as a tax haven as it has favourable tax rates so many companies will not be having operations in Malaysia, but will just rent offices for income shifting (ZIMRA8).

It has been noted with concern that MNEs take advantage of the tax differentials and shift profits from a higher tax jurisdiction to a lower tax jurisdiction such as Switzerland (ZIMRA1 and 8). TCs 1-4 disclosed that they have clients with subsidiaries in low tax jurisdictions and profit shifting definitely occurs because Zimbabwe is a high tax region. This behaviour by MNEs of ‘hiding’ income and assets in low tax jurisdictions or tax havens is in tandem with

the revelation by Oguttu (2016:8) and was confirmed in the SABMiller case study (see Section 2.6.2.1) where SABMiller was taking advantage of the low tax rates offered by the Netherlands. It shows rational thinking by MNEs, but also depicts hypocrisy at the highest level.

The exploitative behaviour of MNEs is said to do harm in three ways which are physical, economic and psychological and among them include depletion of scarce resources, loss of FDI and increased poverty (Mehafdi, 2000). The various strategies such as the use of tax havens reflect the self-serving attitude of a few MNEs that cause "the detriment of many". Sikka and Willmott (2013) added that because of neo-liberalism, tax avoidance has been normalised and is engineered by the big accountancy firms. Lowering the tax burden is attractive to companies since payment of additional taxes is detrimental to shareholder value (Nardi, 2016). Asongu and Nwachukwu (2016) defend transfer pricing abuse by MNEs arguing that it is justified by the CSR activities carried out by the same.

Despite these transfer pricing strategies, ZIMRA has also been alleged to be contributing to revenue leakages through corruption. It has been accused of impression management, by putting big banners of their vision and mission statements together with banners of Zero Tolerance to Corruption yet the majority of the officers are corrupt and unscrupulous (TC3). Ali, Fjeldstad, and Sjursen (2013) found that corruption by tax officials reduces tax compliance by 6% in South Africa.

Through content analysis, the researcher discovered that while Zimbabwe has tried to align its transfer pricing rules to international standards, the exploitative rationalities of MNEs and the implementation challenges of the transfer pricing policies mainly caused by its economic realities compel it to take reactive steps that may not resemble global principles.

There seems to be strong unevenness in both interpretation of the transfer pricing rules as well as implementation, for instance the treatment of the thin capitalization rule vis-à-vis the arm's length principle. The disharmony in tax laws create opportunities for exploitation by taxpayers (Dharmapala, 2014), and legislative clarity is one of the canons of a good tax system (Tapera & Majachani, 2017:6-7). Though the interpretive differences among the three actors are healthy and simply confirm the existence of rationality traits in them, an unharmonised tax system is unhealthy. This is exacerbated by the ineffectiveness of the fiscal appeal court (as characterised by the fiscal backlogs) while Bagchi (1995) advocates that

there is need for an omniscient judge. From a practical perspective, the legal rationality is in favour of ZIMRA as evidenced by the requirement for taxpayers to pay for the additional tax even before the case is concluded by the courts (Section 69 of the ITA). Next are the detailed novel findings from “Thinking with theory”.

7.6 PART 2: THINKING WITH THEORY

This section crystallises the traditional forms of analysis such as coding with a scholarly evidenced way of data analysis referred to as ‘thinking with theory’ which involves plugging theory with data as suggested by Marn (2015) and Mazzei and Jackson (2012). This section discusses the theoretical implications of the findings of this study as guided by the rationality theory (refer to Chapter 2) stratified into legal, implementation and exploitative lenses. These formed the three main themes that guided the theoretical coding process.

7.6.1 Theoretical Coding

The researcher interrogated the literature and assumed an appropriate theory that could provide a more generalised account of the behaviour and views around transfer pricing in line with rationality theory. A conceptual framework was therefore arrived at that would guide the objectives of the research and the theorisation required for the study. In order to provide dependable and confirmable research (Section 6.9), the researcher worked with her original interpretation and employed the trustworthiness provided by a second coder. This approach is supported by the seminal article of Barbour (2001:1116). Barbour (2001:1116) advocates that consensus discussions between autonomous coder and researcher are a solid basis for qualitative research. The researcher and second coder agreed on a theoretical code book and data were coded in this regard (The codes and quotations are available on request to the researcher). Given the categorisation agreed to in terms of prefix coding (Friese, 2014), the researcher subsequently presented the outcome of ‘thinking of the study through the lens of the substantive theory’. The sections that follow are emblematic of this thinking.

7.6.2 Theoretical Definitions

This section expounds on three main rationalities, namely;

- Legal rationality;
- Implementation rationality; and
- Exploitative rationality.

The theory of rationality as viewed legally, from an implementation rationality point of view (how to shift from the rules into strategies and operations) and exploitative rationality is well grounded in the data with five categories and 89 codes. Rationality, legally-anchored, is the rule-based rationality applied through legal/policy means, while implementation rationality (closely tied to legal rationality) is what happens in practice, in the application of the legal framework within the context. Extant literature (Oguttu, 2016:15; and Sikka and Willmott, 2010:5) has confirmed the gaps that arise between legislative and implementation frameworks. This may be the gap between the legal, rule-based paradigms and the reality on the ground; the lack of rule-following often necessitated by the messy applied realities or exigencies of the situation as indicated by Bradley (2015) when he observed that the implementation of these diverse rules has provided complexities that vary from country to country. Exploitative rationality is also rationality, but which seeks to use capitalist logic to exploit a situation and/or the legal framework so that profit may be maximised. Brunsson (1993:8) indicates that hypocritical responses are survival strategies of the organisation. Exploitative means that rules are followed in a creative and contradictory way (loopholes are found) so that tax avoidance or tax evasion happens and governance is not upheld. This was echoed by Brunsson (1986:165) when he mentioned that companies may exploit legislative inconsistencies by applying rationalistic decisions to their benefit, leading to less tax revenues that impacts on using tax for public good (Sikka and Willmott, 2010:30).

7.6.3 Theoretical Contributions

Chapter 1 highlighted the importance of this study in assessing the transfer pricing rules in Zimbabwe through exploration of the rational styles of the key players in transfer pricing practices. Quiggin (2005) stresses that the aim of globalisation was to prevent 3rd World poverty and debt from happening, but with MNEs being monopoly providers of investment and employment, and negotiating for generous tax concessions; globalisation has widened the gap between the rich and the poor. Kotz (2000) added that neo-liberalism magnifies class conflicts which can discourage capitalist investment. This leaves governments in a catch-22 situation regarding which path to take between promoting investment and maximising their tax base for the betterment of social amenities. While Kotz (2000) hints that globalisation creates difficulties for individual states to independently regulate business across their borders, he emphasises that the major limiting factor is the political will rather than the technical feasibility of doing so. The following section discusses the theoretical gaps and the theoretical contributions thereto.

7.6.3.1 Theoretical Gap: The Rationality Trichotomy

This study addresses scholarly gaps by contributing to new knowledge by exploring an under-explored three-layered rationality concept (legal, implementation and exploitative). As highlighted in Chapter 1, this has not been covered in any literature in terms of the confluence of these three areas, and as applied to transfer pricing. The researcher theorises how the key players respond to transfer pricing as influenced by the rationality decision-making processes. It captures the subjective human dimensions which are neglected in the existing transfer pricing theory (Li, 2005:47). The subjective nature of human beings portrays rationality characteristics which are revealed in the rationalistic decision-making and actions of organisations. This is a modest contribution that this study brings; however, the researcher encourages further inquiries on transfer pricing by other scholarly endeavours.

Weber's (1968) rationality theory (which mainly captures the legal dimension), may be extended through additional implementation and exploitative rationality layers that emerged in this study. ZIMRA itself pervades transfer pricing with complexity through their rational decisions (with the code "state power on our side" mindset) which are inconsistent, uninformed and paradoxical. This was evident at field level. Within the overall transfer pricing practice, there were countless instances of implementation reality challenges, and rationalistic decisions infused in the empirical data categorised around the three layered theoretical foundations.

7.6.3.2 Theoretical Gap: The Rationality Role of Tax Consultants

Sikka and Willmott (2010:28) are alert to the exploitative behaviour practiced by accountancy firms, and indicate that the behaviour of these have just been looked at from a single perspective in scholarly researches leaving the dark/negative side unexplored. They add that most researchers have placed their focus on the claims by the accountancy firms that they are professional in their conduct and custodians of good governance while ignoring the need to dissect their transactions. Such behaviour amounts to impression management as defined in this study. Brunsson (1993:8) argues that such hypocritical characteristics are a survival strategy for corporates where they exploit inconsistencies by employing rationalistic decisions to their advantage, and this organisational behaviour remains a critical research agenda.

This study captures the text and sub-text of transfer pricing services rendered to MNEs by tax consultants being the "Janus-faced" elements of compliance and exploitative responses to transfer pricing situations. Sikka and Willmott (2010:28) emphasise the role of tax consultants and their argument maybe extended by the role of other key players (in tax avoidance) identified in this study with some also having been identified by Hasseldine et al (2012) such as tax authorities, tax advisors, corporate taxpayers, and the society. Kotz (2000) further indicates the resourcefulness of MNEs that can drive them to dilute threatening legislation.

Despite Asongu and Nwachukwu (2016:2) defending the tax avoidance by MNEs arguing that it is justified by Corporate Social Responsibility (CSR), Sikka and Willmott (2010:30) refute such claims arguing that such behaviour is exploitative and detrimental to public good. CSR by a MNE which is avoiding tax would be regarded as impression management by this study. This study reinforces the importance of the legislative and administrative muscle of the tax authority. It moves from abstract and anecdotal evidence to empirical dissection of the transfer pricing problem in a developing set up context.

7.6.3.3 Theoretical Gap: Territorial Tax System versus Global Standards

Oguttu (2016) calls specifically for research to study the transfer pricing environment at a country level in order to capture country-specific needs arguing that the unique economic and political structures of African states demand specific practical solutions. Durst (2015a:13) also believes that international solutions will not solve developing country problems. Wells and Lowell (2014) stress that the fundamental problems of transfer pricing arise from the long-standing problems of the OECD guidelines. This study recognises Zimbabwe as a country with peculiar economic, social and political structures and reinforces how such unique enterprises demand special redress.

The governments which are at the top of the hierarchy face rational decision-making between tightening their tax laws and creating a "pro-business environment" to meet their economic needs (Hasseldine et al, 2012). For African states the elite e.g. the politicians do not necessarily pay tax (Christensen & Kapoor, No date) because of impunity and because they control politics there are no legal implications on these larger- than- life political personalities who are operating big businesses in Zimbabwe. Sikka and Willmott (2013) observe that the political elite sometimes become a law to themselves to such an extent that legal structures

such as ZIMRA become intimidated to penalise such elite figures for non-compliance with tax laws. This is typical in Zimbabwe, and such structures are barred from enforcing the law by the people who are in control of the government as evidenced by Financial Gazette (2018) headlined “Zim big wigs shield companies from ZIMRA”. Primary data (TC2 and 3) have also uncovered the corruption of unscrupulous ZIMRA officials who extort money from errant taxpayers through bribes. All this exhibits a consequentialist approach to governance which is self-serving and with negative repercussions on the economy at large.

The findings of this study show that substantial work still needs to be done to strengthen the transfer pricing rules in Zimbabwe. They also reveal that Zimbabwe is peculiar in that the canons of taxation are not observed at a higher level thereby exposing Zimbabwe to high levels of profit shifting and negatively affecting ordinary citizens. The study also concurs with Oguttu (2016) that the OECD fails to capture the specific needs of African developing states, and therefore nations should not just take up prescriptions of international laws which are a representation of few countries, but rather exercise their sovereignty.

7.6.4 Responses to Exploitative Rationality in Transfer Pricing

The negative or exploitative elements such as over-invoicing were evident in the data and are reported in Zimbabwe. The existence of legal rationality to prevent and penalise is also evident. What is of concern is the implementation of these rules and the capacity to make sure that the laws/rules are adhered to. From Chapter 1, it was noted that developing countries are handicapped by weak regulative and administrative frameworks (AFRODAD & ZEPARU, 2014; and ZIMCODD, 2014). This study ratifies this significant finding and acknowledges that a gap exists between the legal and the implementation rationality which was alluded to by the likes of Oguttu (2016:18-19). She outlines three factors that aggravate BEPS in Africa which are (1) a lack of relevant international tax laws, (2) inadequately developed domestic laws causing techniques such as treaty abuses, and (3) limited administrative capacity (which include heterogeneous tax systems, incompetent and corrupt tax officials, lack of training of staff, poor remuneration and poor staffing policies and lack of electronic and technological advancement of tax systems). There is strong evidence of these same issues in the data for instance, a lack of legislative clarity, ineffective fiscal appeal, court backlogs, a lack of expertise, corruption, and impartiality (refer to thinking with objectives). ZIMRA is not adequately capacitated both with legislative and administrative resources, thereby causing implementation reality challenges. A lack of harmony between

legislative resources and administrative resources affects effective implementation of the transfer pricing rules in Zimbabwe. One gets the sense of a very functional machine that is trying to get up to speed, but it is hampered by design and capacity challenges. Dharmapala (2014) also stresses inconsistencies in tax laws and their implementation as a limitation to fighting profit shifting. Hasseldine et al (2012) calls for the calibration of policies and administrative responses to tax avoidance. Transfer pricing is regulated by international standards (Hasseldine et al, 2012), but implementation in Zimbabwe is affected by national context and domestic legislation.

The data elucidated a number of legislative and implementation issues, and addressed stakeholders at economic and social levels. The study has also revealed that various transfer pricing strategies exist and has ratified the findings of previous studies that a properly planned transfer pricing regime combined with government action suppresses tax avoidance practices. It also revealed how the administration of transfer pricing is affected by the national context and domestic laws, as Zimbabwean transfer pricing rules exceeds the international standards by enacting domesticated transfer pricing. Additional knowledge on the transfer pricing subject is also provided to help demystify the claim by Fuest et al (2013) that little is known about the effects of base erosion but yet there is significant empirical evidence of its existence.

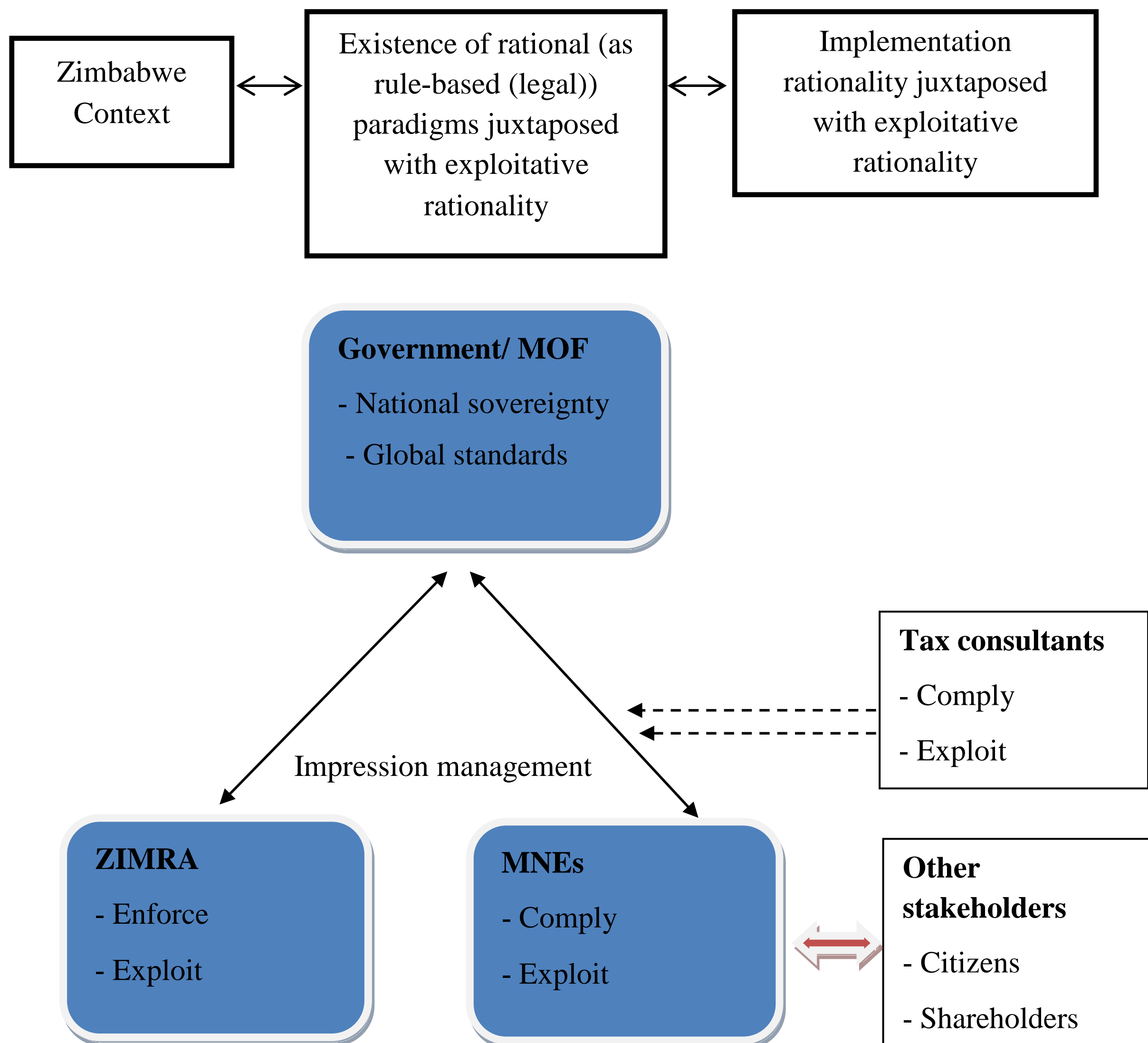
Additional to the discussions of how there is a solid legal framework, there is quite a bit of impression management to place Zimbabwe in a good light. There is variation in the data, too, and a cross cutting view of participants showing that there is no general agreement on some important areas such as documentation requirements. There is a clear message throughout that Zimbabwe has the intent to respond to exploitative rationalities; however, the researcher is left wondering if this is possible, given the number of challenges experienced. Taking this vast amount of information into account, the next section provides the revised conceptual framework after considering the findings from literature and primary data.

7.6.5 Conceptual Framework after Coding (contribution)

The central theory in this study, rationality theory, was split three-fold into legal, implementation and exploitative dimensions, and the first two juxtaposed with the latter, with the main choices being to comply or exploit. These elements are drawn from looking at the rational decisions and actions taken by the key players in transfer pricing issues and to show

their effect on other stakeholders as shown in Figure 4. At the initial stages of conceptualisation in Chapter 2 the role of the tax consultant was not as visible and the implementation realities have now been emphasised through data, and the impact evident on the citizens and shareholders.

Figure 4: Revised Conceptual Framework



Source: Own Compilation

The conceptual framework proved to be a stable working theorising of the study. The three main role-players of Zimbabwe feeding into the rationality, that is legal (rule-based), implementation (which is how the rules play themselves out) and the exploitative rationality of non-compliance had strongly grounded codes. These codes, together with the literature, were interpreted to form themes and then final assertions.

The government is rationalised in choosing between national sovereignty and the global standards, while the tax authority (ZIMRA) is faced with implementation rationalisation and implementation realities as a result of the legal and administrative resources. The voice of the tax consultants as an invisible hand speaks together with the MNEs in the compliance or exploitation decisions. All these decision-making processes by the three prominent actors have either had positive or negative repercussions on the citizens and the shareholders. Where trust in the tax system exists, the ability to generate revenue for public good should not be a struggle. The data has shown how the government is faced with the dilemma to align transfer pricing rules to national priorities against appeasing global expectations. It has also shown that tax authorities are flooded with both legislative deficiencies and administrative incapacities which undermine their enforcement abilities and determine their exploitative choices (given that they have state power on their side). MNEs on the other hand have exploitative traits "close to their skin", and given their resourcefulness they can afford to pay exorbitant fees of tax practitioners in exchange for tax-saving advice which has negative effects on the citizens and positive effects on the shareholders.

According to Weber (1968), legal rationalisation means adhering to the rules even when they cease to make sense. These traditional ways of doing things (this rationality) is not helping because the society is not static as it is affected by the political, economic and social environment. This rationalisation becomes disadvantageous because of its prescriptive nature, bureaucracies and hierarchies. Therefore, can these rules change? The Zimbabwean operating environment is volatile and heavily depends on the rationality characteristics of the political domain as economic actors. Although the rationality theory is criticised for its concept of aggregating the judgements, views, interests, and preferences of different social/economic actors (Elster and Hylland, 1986), it was very useful in the operationalisation of tax avoidance through transfer pricing and in assessing the transfer pricing regime in Zimbabwe.

Impression management was evident from the MOF, ZIMRA and the MNEs. There is enough rationality within the persuasion and compliance spheres of these actors. Impression management is used to emphasise a compliant system and there are clear sub-texts in the system that do not lend themselves to effectiveness of the transfer pricing legal and implementation rationalities for the good of the country. Transfer pricing practices attach importance to showing the prevailing interpretive realities that show the in/effectiveness of national and international standards. Though ZIMRA claims that it has administrative

effectiveness, the majority of the tax consultants strongly disagreed with this. In many instances tax consultants were acknowledging the conception of an unpredictable and uneven tax system which allows inefficiencies. These inefficiencies were a product of implementation realities affected by legislative gaps, communication gaps, interpretive discord, financial constraints and knowledge gaps. Sikka and Willmott (2013) also believe that developing countries may lack the resources to fight base erosion.

7.7 Applied Contributions: Summing up Transfer Pricing Practices

The findings show that rationality characteristics of economic actors drive a critical struggle for supremacy within the national and international contexts. It was confirmed that the OECD is not a "one size fits all", and that its applicability in Zimbabwe needs to be reviewed regularly. Data obtained from this study also shows that despite the substantial overlap between the OECD and UN transfer pricing guidelines, the OECD is preferred and dominantly applied, and this was theorised as rational behaviour (objective 1). Compared to the domestic legislation the OECD and the UN guidelines are more persuasive than binding. Though the magnitude of enhanced revenue yields as a result of the new rules has not been ascertained, the UN (2017) highly recommends that national jurisdictions develop their domestic transfer pricing rules. Use of management services to manipulate transfer prices is the dominant strategy applied by MNEs in Zimbabwe (objective 4). ZIMRA has also been encouraged to draw lessons from tax authorities of other jurisdictions (objective 3). The study also revealed that the CUP and the Cost Plus methods are the most applied in Zimbabwe (objective 1).

The study expands the work of Hasseldine et al (2012) which identified social actors such as the tax authorities, tax advisors, corporate taxpayers, the society and related behaviour of researchers by engaging the tax authority, ZIMRA, MNEs, TCs and MOF. Their study focused on the regulation of tax practitioners, while this study explores the neglected significant differences in national contexts and transfer pricing rules at a domesticated level. It followed a qualitative enquiry as suggested by Finer and Ylonen (2017) who praise qualitative approaches for enhancing understanding of complex social phenomena such as transfer pricing and in awarding access to previously unknown truths against the limitations of dominant quantitative tax avoidance researches. This study crosses the disciplinary boundaries of accounting and the political economy to contribute to tax laws and policy.

This study modestly added to the body of knowledge regarding transfer pricing as a tax avoidance issue which Sikka, Haslam, Kyriacou and Aggrizzi (2007) say is neglected. The theoretical extension of rationality is complementary to Weber's theory of rationality. In fact, beneath the subjective and interpretive paradigms, is a strong stream of sub-text that enables the practice of transfer pricing within a domesticated and international arena. The need to balance foreign investment, public demands, global fitting, and national priorities within diverging laws, standards and processes espouse the overt and covert dimensions of transfer pricing.

7.8 Summary

This chapter crystallises the findings from the data together with the theoretical perspectives that undergird the study. Rationality elements were strong in all economic actors as well as impression management. The objectives of the study were met, and the Zimbabwean tax regime rigorously assessed. The formative evaluations of the transfer pricing rules in Zimbabwe show that Zimbabwe adopted global regulations. These efforts are dampened by both legislative and administrative incapacities. The international standards are not universal and so the country's unique situations are to be addressed at a domesticated level. Zimbabwe has introduced transfer pricing legislation that requires local companies to comply as well. The next chapter provides the conclusions and recommendations of the study.

CHAPTER 8: CONCLUSIONS AND RECOMMENDATIONS

"The concept of transfer pricing is topical and subject to contradictory views…The reality is much more complicated than it seems, because the situations in the economic environment are so different that the transfer pricing analysis can become extremely complex" – Cazacu

8.1 Introduction

This study sought to assess the effectiveness of the transfer pricing regime in Zimbabwe, a subject that has become topical worldwide because of globalisation and unprecedented growth in international trade. As highlighted in Chapter 1, the research took place at a time when Zimbabwe has been making strides to improve its transfer pricing administration, as evidenced by significant legislative reforms in a space of two years (2014 - 2016). The harmful effects and risks of transfer pricing practices by MNEs pose insurmountable pressure on tax jurisdictions, and also create economic turmoil among taxpayers and tax practitioners. The study also comes at a time when Zimbabwe has faced political unrest and economic downturn, and is making efforts to attract foreign investment with the new president having declared, "Zimbabwe open for business and foreign investment" (Reuters, 2018). Wanting foreign investment and attracting it are two different things, of which the latter is often a challenge for many developing nations. Political harmony, economic, legislative and administrative systems are some of the ingredients needed to attract investment. The international community has intervened with the OECD and UN having issued transfer pricing guidelines. This study examined the approaches adopted by Zimbabwe against these international guidelines, and related them to the practices adopted by South Africa, Kenya, China and the UK (all being trade partners of Zimbabwe).

This chapter provides the contributions of the study to the body of knowledge by summarising the major findings from the previous chapters and providing suggestions for future research. Section 8.2 presents the research objectives and how they have been addressed, Section 8.3 provides a summary of the contributions of this study. Section 8.4 presents the contextual contributions, while Section 8.5 presents the theoretical contributions, and Section 8.6 discusses the methodological contributions of the study. Section 8.7 reveals the conclusion and research limitations, while Section 8.8 presents recommendations and Section 8.9 makes suggestions for future research.

8.2 Realisation of Research Objectives

In order to achieve the overall objective of assessing transfer pricing rules in Zimbabwe so as to effectively regulate MNEs transactions without depriving Zimbabwe of its legitimate revenue and without impeding foreign investment into Zimbabwe, the following research objectives guided the study and were addressed in the respective chapters.

Table 18: Realisation of Research Objectives

OBJECTIVE	ADRESSED IN
1. To explore the Transfer Pricing methods outlined in the OECD and United Nations guidelines	**Chapter 4, and 7**
2. To compare the laws and policy measures in Zimbabwe that regulate transfer pricing against the OECD and UN guidelines	**Chapter 3 and 7**
3. To examine measures that curtail transfer pricing employed by other countries (i.e. South Africa, Kenya, China and the UK) and their experiences of this phenomenon. These countries were selected so that Zimbabwe could draw lessons from them.	**Chapter 5 and 7**
4. To examine the nature and types of transfer pricing strategies utilised among MNEs in Zimbabwe by means of a document review and then operationalising it in an interview schedule	**Chapter 2, 3 and 7**

Source: Own Compilation

The study followed a systematic approach guided by the objectives, literature and theoretical perspectives provided for in Chapter 1 and 2. Chapter 3 explored the transfer pricing rules existing in Zimbabwe, and Chapter 4 provided the findings of the document review of the seminal guidelines on transfer pricing, and compared them with the transfer pricing rules and policies in Zimbabwe. It was found that despite the OECD's theoretical superiority its guidelines have their own flaws which would require local laws to address. In Chapter 5, a country by country analysis was conducted with selected countries in order to draw transfer pricing lessons from them and make informed recommendations to Zimbabwe. All the selected countries have adopted the OECD guidelines, but are at an advanced stage with their transfer pricing laws in comparison to Zimbabwe. Chapter 6 presented the qualitative methodological choices and processes applied in the study, while chapter 7 presented the interview results and their interpretation. This led to the emergence of new information that provided the basis for the original contribution to the body of existing knowledge on transfer pricing in Zimbabwe from a contextual, theoretical and methodological perspective.

8.3 Summary of Contributions

The following table is created to foreground the contributions of this study.

Table 19: Summary of Contributions

Contribution	Details
Contextual	Assessing both legislative and administrative capacities of a developing country in addressing transfer pricing at a domesticated level has received little attention in existing literature. Further, the comparison of the UN and OECD transfer pricing guidelines as an examination of their applicability to the Zimbabwean context has not been considered in previous academic research. Thus, the research findings contribute to the formulation of a revised transfer pricing policy for Zimbabwe as Saunders et al (2012) stress that the role of research is to provide material for the development of laws.
Theoretical (Central to a PhD Study)	This study addresses scholarly gaps by contributing to new knowledge by exploring an under-explored and researcher-conceptualised three-layered rationality view. Central to a PhD study, the researcher has built on existing theoretical frameworks deemed relevant to the research objectives and direction of this study. The three-layered view, in terms of 'rationality', is not written up, as yet, outside of this study. The study uncovered these notions, and presents the theorising thereto, as the original contribution.
Methodological	To the best knowledge of the current researcher, no study has been carried out following interpretive, qualitative approaches (especially) and using interviews and document analysis as two data sources with purposive sample of participants who might be difficult to access. The study breaks new ground for an area that is predominated by quantitative methodologies.

Source: Own Compilation

8.4 Contextual Contributions

Business advisers and scholars claim that transfer pricing is an on-going international tax conundrum, and this study contributed to the research on transfer pricing as a tax avoidance tool which has been neglected in the academic tax literature. The central gap to formatively evaluate transfer pricing laws and policies both contextually and theoretically applying qualitative methods has not been done before in Zimbabwe. Oguttu (2017:18) encourages research that addresses specific needs at national level and Dharmapala (2014) acknowledges the limitations of the BEPS Action plan in addressing domestic problems.

Considering the eccentric characteristics of Zimbabwe's economic, social and political environment and scrutinising the complex structures and practices within the country was critical given that Sikka and Willmott (2010:9) allude to developing countries tax authorities only able to adjust transfer pricing if they have the necessary administrative and legislative resources. Kotz (2000) added that the effectiveness of legislative powers is a function of political will as MNEs, through lobbying and patronage may dilute threatening legislation.

A comparative examination was made between the OECD and UN transfer pricing guidelines, and findings showed that the UN has negligible differences with the OECD, with the latter having constant updates unlike the former, resulting in little or no application of the former in Zimbabwe. A country-by-country analysis was also conducted with selected countries, and findings revealed that the OECD’s ALP is widely used for determining transfer prices. This wide use of the OECD guidelines in many jurisdictions, including Zimbabwe may be an exhibit of geopolitical supremacy. The ALP is achieved through the application of the five methods prescribed by the OECD. Apparently the traditional transactional methods are preferred to the profit transactional methods. Though Zimbabwe has progressed from general anti-avoidance rules (GAAR) to specific transfer pricing rules, the implementation of the rules is limited by both legislative and administrative factors.

Sikka and Willmott (2010:7) espoused that MNEs direct their attention to transfer pricing strategies that minimise taxes in order to achieve higher shareholder value and executive rewards. These strategies include among others, the commercial tax avoidance strategies sold by accountancy firms which they say have been neglected by accounting researchers which predominantly focus on auditing and accounting matters. Findings of this study revealed that MNEs in Zimbabwe are indeed in the habit of avoiding tax through strategies such as manipulation of transfer prices of management services, over-invoicing/under-invoicing, treaty shopping and use of low tax jurisdictions with the assistance of tax professionals. Hence Zimbabwe took a step in the right direction when it enacted specific transfer pricing rules in 2016 though their effectiveness is largely affected by a lack of legislative clarity, inconsistencies in application of rules, legislative inadequacies, and an incapacitated tax authority.

A lack of legislative clarity was shown by inconsistencies in the treatment of the ALP against the thin capitalization rule of 3:1 with the latter taking precedence over the former. It is not conclusive as to whether Zimbabwe should continue with the thin capitalization rules because the BEPS Action Plan 13 supports it. On the other hand, other countries such as South Africa repealed the thin capitalization rule of 3:1 and embraced the ALP. Durst (2015a:14) also warns developing countries of giving unwarranted attention to BEPS arguing that they should concentrate on their already limited enforcement resources on developing fiscal instruments that will enhance their revenue. The restrictions on management fees against the arm’s length principle were also raised, and participants requested ZIMRA to provide clarity on this issue.

The rules have also been accused of being unfairly applied to domestic transactions and the participants acknowledged that domestic transactions pose a transfer pricing risk to the national tax base. Tax consultants were most vocal regarding the non-selective application of domestic transfer pricing arguing that it burdens the Small and Medium Enterprises (SMEs) and defeats the pro-business mantra. Despite the tax consultants venting their frustrations over the application of transfer pricing rules to domestic transactions, it seems related companies with domestic transactions are the ones complying with the rules more than those that have cross-border transactions. This definitely discourages the compliant firms and has fiscal implications which have an ultimate effect on the public good. Findings suggest that Zimbabwe is the only country applying transfer pricing to domestic transactions which results in high compliance costs for domestic firms while international guidelines are silent about it. In the final analysis, this research suggests that domestic transfer pricing be reconsidered from a Zimbabwean perspective.

Legislative inadequacies have also been cited with the local laws failing to address the documentation requirements, specify the deadlines for submission of the documentation, provide a specific transfer pricing penalty regime, as well as capturing APAs. A lack of APAs was revealed as placing a great disadvantage for Zimbabwe as this creates uncertainty yet certainty is what investors are searching for. Oguttu (2006b:473) commends APAs despite the fact that developing countries lack the experience and expertise to administer them (Oguttu, 2016, Becker, Davis & Jakobs, 2014). According to the transfer pricing best practices in Chapter 4, most countries have strengthened their transfer pricing legislation by enacting APAs and improving their documentation requirements.

Other countries such as South Africa have legislated the Country-by-Country report as part of the transfer pricing documentation required by the tax authority yet Zimbabwe does not specify the contents nor structure of even the local file let alone the master file. This is a big limitation if transfer pricing is to be effectively administered. The taxpayers are in turmoil with regard to when to submit the documentation, and similarly ZIMRA does not know how the documentation should be structured.

On the administrative side, the tax authority (ZIMRA) is incapacitated with a lack of interpretation notes to simplify the rules and to minimise multiple interpretations. ZIMRA also lacks sound staffing policies which exposes it to high staff turnover (losing staff to tax

consultancy firms), multiple staff transfers and instability coupled with numerous managerial positions in acting capacities. Such revelations ratify the findings by Collins and Mulligan (2014:18) that tax authorities fail to retain their staff members and lose them to the big four accountancy firms. ZIMRA is also restricted by inadequate experience, knowledge and skills as well as the absence of a specialised transfer pricing team, an area which would indisputably strengthen its transfer pricing administration.

ZIMRA lacks databases for comparable data leaving tax consultants with the burden to subscribe to commercial databases which are exorbitantly expensive. The use of foreign databases is permissible by law but is hypocritical, rational and exhibits impression management as these databases do not reflect the economic characteristics of Zimbabwean pricing models. Because of Zimbabwe's economic status and weak economic activity, comparable data is a big challenge, and tax consultants have resorted to subscribing to databases such as KT Mine and Onesource administered by Thompson Reuters. Access to such databases would aid in addressing the major challenge of the effective administration of transfer pricing. Therefore, the MOF was urged to create a database for comparables.

Knowledge gaps and the inconsistent application of rules have been cited especially in regional offices since transfer pricing is only handled at the head office in Harare. Lack of administrative coordination within the tax authority can promote revenue leakages through transfer pricing. Furthermore, the ineffectiveness of the fiscal appeal court deters investment as transfer pricing adjustments are frequently contested, and court cases remain unresolved. The rationality tendencies of ZIMRA in forcing taxpayers to pay additional tax before the court process has been concluded were castigated.

Having a robust penalty regime is an ingredient for an effective transfer pricing system. Paradoxically, Zimbabwe resorts to the ordinary penalties for transfer pricing cases. Though the general penalties may prohibit non-compliance tendencies, of the countries reviewed (Chapter 5), Zimbabwe was the only country without specific penalties. ZIMRA uses general penalties and invokes Section 81 of the ITA for failure to keep transfer pricing documentation, and for non-compliance with any of the rules. However, participants indicated that it was important to benchmark and fine-tune the penalty regime and practices for transfer pricing in order to align them with international standards.

8.5 Theoretical Contributions

This study attends to scholarly gaps by contributing to new knowledge by exploring an under-explored three-layered rationality concept (legal, implementation and exploitative). The conceptual framework after coding (Section 7.6.5) represents the integration of the contribution. The researcher, therein, theorises how the key players respond to transfer pricing as influenced by the rationality decision-making processes and extends the insights on different kinds of rationality theory, as applied to a critical context. This study modestly adds to the body of knowledge regarding an all important concern of transfer pricing as a tax avoidance issue which Sikka et al (2007) said was neglected. The theoretical extension of rationality is complementary to Weber's (1968) theory of rationality and provides additional vocabulary thereto, backed up through empirical work in one country, but with generic areas that may be applied more universally. The need to balance foreign investment, public demands, global fitting, and national priorities within diverging laws, standards and processes espouse the overt and covert dimensions of transfer pricing.

This study ratifies the role played by tax consultants as carriers of the Janus elements (elements where one has to look in two directions simultaneously) of compliance and exploitative responses to transfer pricing by MNEs. ZIMRA is not adequately capacitated both with legislative and administrative resources, thereby causing implementation reality challenges. For instance, the use of foreign databases is permissible at law but hypocritical and exibiting impression management as these databases do not reflect the economic characteristics of Zimbabwean pricing models.

Dharmapala (2014) also stresses inconsistencies in tax laws and their implementation as a limitation to fighting profit shifting. It is not only the complexity arrangements of MNEs that complicate transfer pricing, but ZIMRA also pervade transfer pricing with complexity through their rational decisions (with the "state power on our side" mind set) which are not always consistent.

Despite the transfer pricing strategies employed by MNEs, it has also been alleged that ZIMRA is contributing to revenue leakages through corruption. It has been accused of impression management by putting big banners of their vision and mission statements together with banners of Zero Tolerance to Corruption yet the majority of the officers are corrupt and unscrupulous (see Section 7.5.1.4). The uneven implementation of the rules has

also been described as loopholes for revenue leakages and is stifling production and therefore suppressing potential tax revenue.

Transfer pricing is regulated by international standards (Hasseldine et al, 2012), but implementation in Zimbabwe is affected by the national context and domestic legislation which novels the war between territorial sovereignty and global fitting. Data also revealed that Zimbabwe is peculiar in that the canons of taxation are not observed at a higher level, mainly because of "politics leading the economy" and not the other way round. Resultantly, this exposes Zimbabwe to high levels of profit shifting that ultimately negatively affect ordinary citizens. The study also concurs with Oguttu (2016:20) that the OECD fails to capture the specific needs of the African developing states, and therefore nations should not just take up prescriptions of international laws which are a representation of few countries, but rather exercise their own sovereignty.

The findings revealed some legislative deficiencies, communication gaps, inconsistencies and administrative challenges. These findings illuminate legislative gaps that are still in existence, the importance of administrative capacity and suggest focal areas for future research to be conducted by both national and international agencies and researchers. Additional knowledge on the transfer pricing subject is also provided to help demystify the claim by Fuest et al (2013) that little is known about the effects of tax base erosion yet there is significant empirical evidence of its existence.

8.6 Methodological Contribution

The researcher took a grand step in employing qualitative methodologies following the interpretivism paradigm in a space that is predominated by quantitative research. The crystallization of in-depth interviews and document analysis in a manner that is demanded by qualitative designs (richness and rigour) represents the methodological contribution. Interview data were gathered from information-rich participants (tax consultants, tax authorities and legislators) supported by literature (Hasseldine et al, 2012). The qualitative methodological norms (Moon et al, 2016) and ethical considerations have been observed (Greener, 2008). Interview de-briefing, member checks and synergistic guidance by the second coder increased the trustworthiness of the data. No study has previously been done on transfer pricing following interpretive qualitative approaches (especially) and using

interviews and document analysis as two data sources with purposive sampling of participants who might be difficult to access.

8.7 Overall Conclusion and Limitations

The research objectives were achieved by the theoretical and contextual noveling of findings from both primary and secondary data which strengthened the results. The research involved a formative evaluation of the transfer pricing regime in Zimbabwe and found an outlier, i.e. the application of transfer pricing to domestic transactions. While the risks associated with transfer pricing are postulated to be high in cross-border transactions, Zimbabwe settled for national sovereignty against global standards. The irony is in that related party firms with domestic transactions are complying with the rules more than those with cross-border transactions – an occurrence that is harmful to the fiscus.

While the OECD guidelines have been predominantly adopted in the world, the UN acknowledges that profit shifting can manifest differently as determined by the legal and administrative framework. Importantly, international standards are not universal and so a country's unique situation should be addressed at a domestic level. Transfer pricing is a global issue, and its practice is not uniform for all countries. Because of the heterogeneity of economic environments, controversies, and complexities surrounding the transfer pricing concept as alluded to by Cazacu (2017:19), the claims of this study may persuade further questions and the world would benefit from additional research through different renditions if alternative theoretical underpinnings are applied.

The central theory applied in this study namely; rationality theory, helped elucidate the intricacies and nuances of transfer pricing. Its stratification into three layers helped to formatively evaluate transfer prices in Zimbabwe, and contribute to the claims of this study, though it was limited by its concept of aggregating the views, judgements and preferences of different economic factors as echoed by Elster and Hylland (1986). However, it was most appropriate as it captured the subjective human dimensions which Li (2005:47) suggested are greatly neglected in the existing transfer pricing theory. Borkowski (1990) also believed that the existing theory "addressed only specific variables rather than the transfer pricing environment as a whole". Not only is the application of the rationality theory to transfer pricing a theoretical contribution, but its stratification into three dimensions as well is an extension of the seminal work by Weber (1968).

Though the research followed the methodological norms as guided by qualitative enquiries, it was nevertheless subject to limitations. The exploratory nature of the study, and the subjectivity in applying purposive sampling cannot be ignored. The interview data is a reflection of the opinion and ideas of certain participants at a certain time, and the documents used in document review being limited in that they were written for certain reasons and not for the purposes of this study. The combination of both methods helped counter the weaknesses of the other and crystallisation helped by allowing for multiple realities to be considered. The interpretivist paradigm helped illuminate the understanding of the transfer pricing subject despite the inherent limitations of qualitative inquiry.

Ethical considerations were followed, but the sensitivity of tax matters and the transfer pricing subject is presumed to have resulted in limited responses from the MNEs. The concept of hypocrisy and impression management evident in all the major economic players heightened the sensitivity of respondents to transfer pricing matters. Despite this, the researcher managed to get valuable responses from the MOF, TCs and ZIMRA.

Zimbabwe has much to lose with an ineffective tax system since a greater portion of its tax revenue comes from taxing MNEs that have invested in their country (Oguttu, 2016:27). Addressing tax-motivated transfer pricing by MNEs would result in increased national revenue and the provision of quality public goods and services. Thus the study can confidently conclude that evidence from both literature and primary data confirm the deficiencies in the Zimbabwean transfer pricing rules. Despite Zimbabwe’s commendable efforts to plug tax avoidance through transfer pricing, its legislative framework is not yet water-tight and has room for improvement. The antagonistic and rationalistic behaviour of MNEs and the lack of adequate legislative instruments pose implementation challenges for ZIMRA. The divergence between national and international tax systems also create challenges for tax authorities, and all this demands domesticated solutions if revenue leakages as a result of transfer pricing are to be effectively plugged.

8.8 Recommendations for Zimbabwe’s Transfer Pricing Administration

Findings of this study have theoretical implications for the citizens, the government, ZIMRA, tax practitioners as well as MNEs as explained below. The recommendations from the study are presented for the advancement of transfer pricing legislation and practice in Zimbabwe.

8.8.1 Alignment of International Standards with African Needs

Zimbabwe is not yet a member of the OECD and the OECD guidelines are persuasive rather than mandatory. After having reviewed literature and gathered interview data, it is recommended that the hybrid approach should be considered – that is, where the OECD and the UN guidelines address the specific needs of developing countries. In addition, and as suggested by some respondents, ATAF should be approached to develop guidelines for African countries. Oguttu (2016:20) believes that the BEPS Action plan is limited by its inability to appreciate the specific needs of developing nations. This calls for customised guidelines and strategies. Therefore, in future it is recommended that ATAF develops transfer pricing guidelines that best align with the needs of African tax jurisdictions.

8.8.2 Government Enhancement of Domestic Transfer Pricing Rules

The success of tax compliance systems is a function of the elements of various economic players which include the state, the tax authority, taxpayers and tax practitioners. The government has a very significant role to play in the development of tax systems if it is going to fulfil its public mandate. Weak tax systems mean low detection of transfer pricing abuse which is countered by MNE aggressivity.

Legislative empowerment is critical together with the provision of finances to capacitate the revenue collecting agent, ZIMRA. The fiscal appeal court should also be capacitated to effectively discharge its duties. It is the apex authority which should set precedence and become the source of law. Its delays in concluding cases do not only stifle the legislative progress but also weakens tax administration and clouds taxpayer confidence in the tax system.

The study also recommends that Zimbabwe come up with thresholds for the preparation of transfer pricing documentation for domestic transactions as suggested by the UN (2017) and practised by countries such as South Africa in their cross-border transactions (Chapter 5, section 5.2.1). For instance, related companies with domestic transactions below $150 000 could be exempted from preparing transfer pricing documentation. This will help minimise tax compliance costs and promote growth for the emerging businesses.

8.8.3 Provision of Interpretation Notes and Exercising of Due Diligence by ZIMRA

A lack of interpretation notes from ZIMRA has been described as a limitation to the effectiveness of the transfer pricing rules. It is therefore recommended that ZIMRA prepares interpretation notes to simplify the rules and reduce multiple intepreattions by stakeholders.

The call on ZIMRA to exercise due diligence especially with the mining sector, requires specialist training, financial resources and sound policies so as to minimise the risk of revenue losses. Chiweshe (2016) also stresses the importance of an aggressive audit team which checks transfer pricing compliance by MNEs. Particular attention is required with the transfer prices of management fees among related companies. ZIMRA is encouraged to draw lessons from tax authorities of other jurisdictions, and is strongly urged to get rid of unscrupulous officers within its organisation.

8.8.4 Elimination of Inconsistencies

The results suggest that ZIMRA should eliminate inconsistencies by providing interpretation notes to the public, iron out disparities between the principal and subsidiary legislation, and desist from abusing the notion that they have state power on their side. Creation of supportive staffing policies that promote efficiency is encouraged. To achieve this, ZIMRA has to improve the specialisation of its staff's skills by training them on the nuances and intricacies of transfer pricing as well as decentralising transfer pricing practice to allow regional offices to handle transfer pricing cases at a regional level. Capacitating the regional officers would ensure uniform application of the transfer pricing provisions. A specialised team is envisaged to help close the skills gap as well as resolve sector issues that require technical expertise and to conduct aggressive transfer pricing audits.

Zimbabwe has a lot to learn from its counterparts such as South Africa which have experience in transfer pricing administration, and could adopt other measures such as CbC reporting that South Africa has incorporated. Collegiality with other tax authorities is encouraged, and Zimbabwe is urged to adopt APAs, specific documentation requirements, and a specific penalty regime to iron out legislative and administrative gaps, ensure certainty and promote foreign direct investment.

8.8.5 Intensive Scrutiny of MNEs

The capitalist ideologies of MNEs are contrary to the neoliberal systems of states. However, a culture of cooperative compliance should be cultivated, and the onus is upon the government to develop a robust tax system which enables ZIMRA to discharge its mandate with the necessary legislative support. ZIMRA should be actively involved in transfer pricing audits and scrutinise MNE transactions especially those in the mining sector.

8.8.6 Regulation of Tax Practitioners

Findings also revealed that it is not only the MNEs that need to be regulated. The call by Hasseldine et al (2012) for states to regulate tax consultants is critical as it is evident that other countries are prosecuting these accounting firms for misconduct and for selling unacceptable tax avoidance strategies/schemes. For example, South Africa's KPMG and the Gupta case which implicated one of the big four accountancy firms (Cropley & Brock, 2017). Zimbabwe does not have such regulations, and so would benefit from introducing them.

8.8.7 Community Engagement

Sikka and Willmott (2010:3) highlight that the operationalisation of transfer pricing may be invisible to the citizens. The rationalisation theory helped unpack some rational decisions made by those with power and economic resources. Social and economic effects are visible, and are characterised by codes such as 'they have state power on their side'. MNEs should engage members of the community from which they operate if they are to balance their right to make a profit and their moral duty to pay their fair share of tax.

8.9 Suggestions for Future Research

Research is an on-going process and research on tax avoidance which continues to be a global problem, is not an exception. Therefore, benefits would accrue if the following suggested theoretical and pragmatic research on transfer pricing is conducted:

- Research which primarily focuses on the complexities of transfer pricing of intangible transactions because this study focused on the broad views of transfer pricing and did not separate tangible from intangible transactions;
- Research on alternative methods to the arm's length principle. As a competing method, the Global Formulary Apportionment method emerged from the study but the applicability of this method was not considered. Therefore, future research that is oriented and guided by the Global Formularly Apportionment method is suggested;

- Research on the application of transfer pricing on domestic transactions is noble and if so, what is the magnitude of revenue lost through domestic transactions and how much revenue is recovered versus the investment lost. This should also include the transfer pricing and compliance cost implications on SMEs;
- Research on tax incentives awarded to foreign investors especially in the extractive industry to determine if they yield the expected results, and to determine the impact of these tax incentives on the economic well-being of developing countries; and
- Research to advance knowledge on transfer pricing rules in Zimbabwe especially focusing on the mining sector despite the magnitude of enhanced revenue yields as a result of the new rules not having been ascertained, as the UN (2017) highly recommends that national jurisdictions develop their own domestic transfer pricing rules.

8.10 Conclusion

This study contributes to the body of knowledge in relation to transfer pricing with regard to contextual, theoretical and methodological gaps. The researcher embraced the post-modern approach to triangulation called crystallisation championed by Ellingson (2009) which fits well with the interpretivist lenses (Denzin & Lincoln, 2011). The combination of interviews and documents also provided a certain rendition on transfer pricing as a practice. The study analysed various documents and 20 interviews with ZIMRA, MOF and tax consultants were conducted by the researcher. Literature, document analysis, interview analysis, and theoretical positions informed the conclusions of this study. The findings provided variety, diversity and different renditions regarding transfer pricing as a concept and suggest various areas for improvement. The findings of the study reinforce the axiological assumptions that humans are subjective and rational, and this position influences the tax compliance decisions of MNEs. The fight against abusive transfer pricing practices, strengthening of the legislative provisions and the capacity buiding of the tax authority should assist in broadening the tax base and ultimately help finance the nation's Sustainable Development Goals (SDGs).

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ANNEXURES

ANNEXURE 1: ZIMRA Permission Letter

ZIMBABWE REVENUE AUTHORITY
COMMISSIONER GENERAL

WRITE TO:	TELEPHONE:	CALL AT:	IN REPLY PLEASE QUOTE:
THE COMMISSIONER GENERAL ZIMBABWE REVENUE AUTHORITY PO BOX 4360 HARARE	+263-4-790811-4 FAX: +263-4-792113 TELEGRAPHS: HARARE	RECEPTION 6TH FLOOR ZB CENTRE CNR FIRSTSTREET & KWAME NKRUMAH AVE HARARE	Authority to conduct research

13 December 2017

6692 Mkoba 18
Gweru

Dear

RE: APPLICATION FOR AUTHORITY AND ASSISTANCE TO CONDUCT RESEARCH

Topic: Regulating MNC transaction to minimize tax avoidance through transfer pricing. Case of Zimbabwe

The above matter refers:

Please be advised that your application for authority to carry out the above research has been approved. However, we may be unable to release some of the information to you because of its confidential nature. Upon completion, you are required to furnish this office with a copy of your final research findings.

We wish you success in your studies.

Yours Faithfully,

S. SITHOLE
HEAD HUMAN RESOURCE ADMINSTRATION

ACKNOWLEDGEMENT

I, ...Eukeria Mashin..., acknowledge receipt of this letter and note its contents.

Signature .... Date...14/12/17...

ANNEXURE 2: MOF Permission Letter

ZIMBABWE

MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT
New Government Composite Building
Corner Samora Machel Avenue/ Fourth Street
Harare
Zimbabwe

08 May 2017

Midlands State University
Faculty of Commerce
Telone Campus
P Bag 9905
Gweru

Dear Madam

RE: REQUEST TO CARRY OUT ACADEMIC RESEARCH ON REGULATING MULTINATIONAL ENTREPRISE TRANSACTIONS TO MINIMISE TAX AVOIDANCE THROUGH TRANSFER PRICING IN THE MINISTRY OF FINANCE AND ECONOMIC DEVELOPMENT.

Reference is made to your request to conduct an academic research in the Ministry of Finance and Economic Development on the above subject.

I am pleased to advise that your request has been approved to carry out research in the Department of Revenue and Tax Policy.

The approval is on condition that your research will be confined to the area of "Regulating Multinational Enterprise Transactions to Minimise Tax Avoidance through Transfer Pricing researching on Policy issues " as per your request and that the research is for academic purpose only.

S. Jaiios
FOR: SECRETARY FOR FINANCE AND ECONOMIC DEVELOPMENT.

ANNEXURE 3: Informed Consent Form

CONSENT TO PARTICIPATE IN THIS STUDY

I, ______________________ (participant name), Position _________________confirm that the person asking my consent to take part in this research has told me about the nature, procedure, potential benefits and anticipated inconvenience of participation.

I have read (or had explained to me) and understood the study as explained in the information sheet.

I have had sufficient opportunity to ask questions and am prepared to participate in the study.

I understand that my participation is voluntary and that I am free to withdraw at any time without penalty (if applicable).

I am aware that the findings of this study will be processed into a research report, journal publications and/or conference proceedings, but that my participation will be kept confidential unless otherwise specified.

I agree to the recording of the interview.

I have received a signed copy of the informed consent agreement.

Participant Name & Surname ………………………………………… (please print)

Participant Signature…………………………………………..Date…………………

Researcher's Name & Surname……………………………………… (please print)

Researcher's signature…………………………………………..Date…………………

ANNEXURE 4: INTERVIEW GUIDE FOR MNEs/TCs, ZIMRA and MOF

INTERVIEW GUIDE FOR MNEs/TCs

My name is XXX and I am a PhD student with the University of South Africa. My topic is **"Regulating MNEs transactions to minimise tax avoidance through transfer pricing, Case of Zimbabwe."**

Thank you for the interview and for considering the following interview guideline that I shall work through with you. The interview is divided into two sections. Section A provides you with specific questions to which you are able to respond in terms of factual and substantive areas of transfer pricing. This does not mean that you may not express your opinion, but it would be useful to have your response to the more formal, legalistic and compliance requirements of the new rules and transfer pricing. Section B allows you to spend some time in the interview discussing the issues in a more open-ended and exploratory manner and for you to relate any specific examples, narratives and views that will add value to the topic under discussion so as to assess the transfer pricing rules in Zimbabwe.

Section A

This section of the interview will request that you respond to questions that require a more legalistic and factual consideration of the topic under discussion to help assess transfer pricing rules in Zimbabwe.

Current rules

1.1 Zimbabwe has recently introduced new transfer pricing rules, how have they affected your operation?

1.2 Are there explicit statutory requirements for documentation?

1.3 How clear are the requirements by ZIMRA to maintain documentation and the deadlines for submission to taxpayers?

1.4 Does Zimbabwe have APA procedures? If so where are they laid down?

1.5 Which specific penalties apply to transfer pricing abuse?

1.6 What are the dispute resolution procedures in the case of a transfer pricing adjustment in Zimbabwe? To what extent is the fiscal appeal court functional?

Current rules challenges

2.1 What opportunities and/or challenges do you face in applying the new rules?

2.2 How do you practically handle such opportunities and/or challenges?

2.3 Which databases do you prefer or recommend for use for transactions that are not readily available locally?

2.4 To what extent do these databases provide comparable data, and of similar transactions?

2.5 Would you say the transfer pricing rules in Zimbabwe minimise tax avoidance through transfer pricing without impeding foreign investment? 2.6 And why?

Transfer Pricing strategies

3.1Do you qualify for and/ or utilise Zimbabwe's tax incentives and do they encourage foreign investment?

3.2 Does your company follow the thin capitalization restriction of 3:1 in Zimbabwe?

3.3 Do you have associates in low-tax jurisdictions?

3.4 What strategies will your company adopt to comply with the new rules?

Capacity of revenue authority

4.1 ZIMRA plays a vital role in detection and oversight of transfer pricing abuse. What authority do they have to apply their mandate to transfer pricing abuse? Please explain

4.2 What capacity do they have to apply their mandate to transfer pricing abuse? Please explain.

4.2 Is the capacity an issue of:

Policy-Yes or No: Explain briefly

Lack of experience-Yes or No: Explain briefly

Financial resources-Yes or No: Explain briefly

Do you believe ZIMRA is effective in carrying out its mandate when it comes to transfer pricing?

4.3 What do you suggest should be done for the transfer pricing rules administration to be effective?

International guidelines

5.1 How applicable are the OECD guidelines to Zimbabwe?

5.2 Of the 5 OECD methods (CUP, resale price, Cost-plus, TNNM, profit split method) which ones do you use the most? 5.3 And Why? Have you had problems with applying any of these methods?

5.4 What is the relevance of UN transfer pricing guidelines in your application of transfer pricing methods?

5.5 Do you think transfer pricing rules in Zimbabwe are clear and appropriate to promote foreign investment?

Section B

This section of the interview will request that you respond to interview prompts that require a more exploratory and explanatory consideration of the topic under discussion. You are free to narrate experiences and examples here so as to respond to the nature of the study, and help assess the transfer pricing rules in Zimbabwe.

Section B	**Question**
Zimbabwe current rules	1. Zimbabwe has recently introduced new transfer pricing rules, would you *outline specifically* some of the ways in which these rules have affected your operational thinking and operational behaviour?
Zimbabwe current rules	2. New rules are normatively explained/interpreted for taxpayers. In your view, have you as taxpayers been inducted into these new rules? Do you think that the induction process (as described) has enabled or hampered behaviour change?
Current rules challenges	3. New rules often come with changes and change management: Have you faced any challenges in applying the new rules? If so explain. Are there any sections of the laws that govern transfer pricing and tax avoidance that you would like amended? Why?
Transfer pricing strategies	How will your company work strategically and adapt so as to adopt the new rules and ensure compliance?
Authority and capacity of tax authority	Are there any additional comments you wish to make about the authority and capacity of the tax authority over and above the responses that you provided in Section A?
International guidelines	7. In your view, how helpful and enabling are the international guidelines and methods in the context of Zimbabwe and from your perspective as MNEs? Probe: Would you be so kind as to explain to me how you view the influence, role and authority of international guidelines and methods in this context? Which guidelines are you following, OECD or UN? Why?

INTERVIEW GUIDE FOR ZIMRA

My name is XXX and I am a PhD student with the University of South Africa. My topic is **"Regulating MNEs transactions to minimise tax avoidance through transfer pricing, Case of Zimbabwe."**

Thank you for accepting to do the interview and for considering the following interview guideline that I shall work through with you. The interview is divided into two sections. Section A provides you with specific questions to which you are able to respond in terms of factual and substantive areas of transfer pricing. This does not mean that you may not express your opinion, but it would be useful to have your factual response to the more formal, legalistic and compliance requirements of the new rules and transfer pricing. Section B allows you to spend some time in the interview discussing the issues in a more open-ended and exploratory manner and for you to relate any specific examples, narratives and views that will add value to the topic under discussion so as to assess & try to improve where necessary the transfer pricing rules in Zimbabwe.

Section A

This section of the interview will request that you respond to questions that require a more legalistic and factual consideration of the topic under discussion to help assess the transfer pricing rules in Zimbabwe.

Current rules

Do you feel the following areas have been adequately covered in explanations in legislation or separate interpretations to taxpayers?

1.1 Are there explicit statutory requirements for transfer pricing documentation?

1.2 How clear are the requirements by ZIMRA to maintain documentation and the deadlines for submission to taxpayers?

1.3 Does Zimbabwe have APA procedures? If so where are they laid down?

1.4 Which specific penalties apply to transfer pricing abuse?

1.5 What are the dispute resolution procedures in the case of a transfer pricing adjustment in Zimbabwe? To what extent is the fiscal appeal court functional?

Current rules challenges

2.1 What opportunities and/or challenges do you face in implementing these new rules?

2.2 How do you practically handle such opportunities and/or challenges?

2.3 Would you say the rules have enhanced your revenue collection mandate?

2.4 Which databases do you prefer or recommend for use for transactions that are not readily available locally?

2.5 To what extent do these databases provide comparable data, and of similar transactions?

2.6 Would you say the transfer pricing rules in Zimbabwe are enough to curtail tax avoidance through transfer pricing?

2.7 Why?

Transfer Pricing strategies

3.1 What strategies are used by MNEs to avoid tax through transfer pricing?

3.2 Between income shifting, tax havens and tax incentives, which one is mostly used by MNEs to avoid tax through transfer pricing? And why?

3.3 How do the tax incentives offered in Zimbabwe complement or make redundant the transfer pricing rules?

3.4 How does the thin capitalization restriction of 3:1, in Zimbabwe, complement or make redundant the transfer pricing rules?

Capacity of ZIMRA

4.1 ZIMRA plays a vital role in detection of transfer pricing abuse.

4.2 What authority do you have to apply your mandate to transfer pricing abuse? Please explain

4.3 What capacity do you have to apply your mandate to transfer pricing abuse? Please explain

4.4 Is the capacity an issue of:

Policy- Yes or No: Explain briefly

Lack of experience- Yes or No: Explain briefly

Financial resources- Yes or No: Explain briefly

4.5 Have you ever detected any transfer pricing abuse by MNEs?

4.6 What do you prefer using between deterrent measures like tax audits and persuasive measures?

4.7 What do you suggest should be done for the transfer pricing rules administration to be

effective?

International guidelines

5.1 How applicable are the OECD guidelines to Zimbabwe?

5.2 Of the 5 OECD methods (CUP, resale price, Cost-plus, TNNM, profit split method) which ones do you prefer? Why?

5.3 Have you had problems with applying any of these methods?

5.4 What is the relevance of UN transfer pricing guidelines in Zimbabwe? Is it applied in Zimbabwe? If not, why not?

5.5 Do you think transfer pricing rules in Zimbabwe are clear and appropriate to promote foreign investment?

Section B

This section of the interview will request that you respond to interview prompts that require a more exploratory and explanatory consideration of the topic under discussion. You are free to narrate experiences and examples here so as to respond to the nature of the study, and help assess the transfer pricing rules in Zimbabwe.

Section B	**Question**
Zimbabwe current rules	1. Zimbabwe has recently introduced new transfer pricing rules, would you *outline specifically* some of the ways in which these rules have affected your operational thinking and operational behaviour? And why you have moved from general anti-avoidance rules to transfer pricing rules?
Zimbabwe current rules	2. New rules are normatively explained/interpreted for taxpayers. In your view, how have taxpayers been inducted into these new rules? Do you think that the induction process (as described) has enabled or hampered behaviour change?
Current rules challenges	3. New rules often come with changes and change management. 3.1 How did schedule 35 affect Section 98A and 98B of the Income Tax Act? 3.2 How have your transfer pricing audits been affected by the new rules? And so far have you encountered any MNEs that have abused transfer pricing? 3.3 Can you explain your experiences and challenges with the application of the new rules by MNEs?
Transfer pricing strategies	4. How will your organisation work strategically and adapt so as to adopt the new rules and ensure compliance?
Authority and capacity of tax authority	5. If you have ever detected any transfer pricing abuse, how have the rules assisted you in executing your mandate? Are there any additional comments you wish to make about the authority and capacity of ZIMRA over and above the responses that you provided in Section A?
International guidelines	6. In your view, how helpful and enabling are the international guidelines and methods in the context of Zimbabwe and from your perspective as ZIMRA? Probe: Would you be so kind as to explain to me how you view the influence, role and authority of international guidelines and methods in this context? Reports say that the OECD represents interests of the developed world and is residence based system oriented while the UN favours the source based tax systems. Which of these is prioritised by Zimbabwean rules and how does this affect you as ZIMRA?

INTERVIEW GUIDE FOR MINISTRY OF FINANCE

My name is XXX and I am a PhD student with the University of South Africa. My topic is **"Regulating MNEs transactions to minimise tax avoidance through transfer pricing, Case of Zimbabwe."**

Thank you for the interview and for considering the following interview guideline that I shall work through with you. The interview is divided into two sections. Section A provides you with specific questions to which you are able to respond in terms of factual and substantive areas of transfer pricing. This does not mean that you may not express your opinion, but it would be useful to have your response to the more formal, legalistic and compliance requirements of the new rules and transfer pricing. Section B allows you to spend some time in the interview discussing the issues in a more open-ended and exploratory manner and for you to relate any specific examples, narratives and views that will add value to the topic under discussion so as to assess the transfer pricing rules in Zimbabwe.

Section A

This section of the interview will request that you respond to questions that require a more legalistic and factual consideration of the topic under discussion to help assess the transfer pricing rules in Zimbabwe.

Current rules

1.1 What triggered the introduction of new transfer pricing rules in Zimbabwe? Do you feel the following areas have been adequately covered in the new rules?
1.2 Do the rules provide explicit statutory requirements for documentation?
1.3 How clear are the requirements by ZIMRA to maintain documentation and the deadlines for submission to taxpayers?
1.4 Does Zimbabwe have APA procedures? If so where are they laid down?
1.5 Which specific penalties apply to transfer pricing abuse?
1.6 What are the dispute resolution procedures in the case of a transfer pricing adjustment in Zimbabwe? 1.7 To what extent is the fiscal appeal court functional?

Current rules challenges

2.1 How do the anti-avoidance rules work with schedule 35?

2.2 How does schedule 35 affect other anti-avoidance sections like Section 98, 16& 23?

2.3 Which databases do you prefer or recommend for use for transactions that are not readily available locally?

2.4 To what extent do these databases provide comparable data, and of similar transactions?

2.5 Would you say the transfer pricing rules in Zimbabwe are now adequate address tax avoidance through transfer pricing?

2.6 Why?

Transfer Pricing strategies

3.1 What strategies are used by MNEs to avoid tax through transfer pricing?

3.2 Between income shifting, tax havens and tax incentives, which ones were targeted by the new rules? Why?

3.3 How do the tax incentives offered in Zimbabwe complement or make redundant the transfer pricing rules?

3.4 How does the thin capitalization restriction of 3:1, in Zimbabwe, complement or make redundant the transfer pricing rules?

3.5 So far have the new rules achieved the intended goals?

Capacity of tax authority

4.1 ZIMRA plays a vital role in detection and oversight of transfer pricing abuse. What authority do they have to apply their mandate to transfer pricing abuse? Please explain

4.2 What capacity do they have to apply their mandate to transfer pricing abuse? Please explain

4.3 Is the capacity an issue of:

Policy- Yes or No: Explain briefly

Lack of experience- Yes or No: Explain briefly

Financial resources- Yes or No: Explain briefly

4.4 What do you suggest should be done for the transfer pricing rules administration to be effective?

International guidelines

5.1 How applicable are the OECD guidelines to Zimbabwe?

5.2 Of the 5 OECD methods (CUP, resale price, Cost-plus, TNNM, profit split method) which ones do you recommend most?

5.3 Why?

5.4 What is the relevance of UN transfer pricing guidelines in Zimbabwe?

5.5 Do you think transfer pricing rules in Zimbabwe are clear and appropriate to promote foreign investment?

Section B

This section of the interview will request that you respond to interview prompts that require a more exploratory and explanatory consideration of the topic under discussion. You are free to narrate experiences and examples here so as to respond to the nature of the study, and help assess the transfer pricing rules in Zimbabwe.

Section B	**Question**
Zimbabwe current rules	1. Zimbabwe has recently introduced new transfer pricing rules, would you *outline specifically* some of the ways in which these rules differ from what was there? And why you have moved from general anti-avoidance rules to transfer pricing rules?
Zimbabwe current rules	2. New rules are normatively explained/interpreted for taxpayers. In your view, how have taxpayers been inducted into these new rules? Do you think that the induction process (as described) has enabled or hampered behaviour change?
Current rules challenges	3. New rules often come with changes and change management: What do you expect should be achieved by these rules? What challenges have you experienced in introducing the rules? How does schedule 35 work with the other anti-avoidance sections of the law?
Transfer pricing strategies	5. Against the sophistication of transfer pricing strategies used by MNEs, how have the Zimbabwean rules been structured to counter the transfer pricing abuse by MNEs and ensure compliance?
Authority and capacity of tax authority	6. As the Min of finance, and may you explain the authority that you have conferred to ZIMRA to carry out its mandate effectively? b. May you explain the capacity (financial resources, experience…) that ZIMRA has to carry out its mandate
International guidelines	7. In your view, how helpful and enabling are the international guidelines and methods in the context of Zimbabwe and from your perspective as MoF? Would you be so kind as to explain to me how you view the influence, role and authority of international guidelines and methods in this context? Reports say that the OECD represent interests of the developed world and is residence based system oriented while the UN favours the source based tax systems. Which of these is prioritised by Zimbabwean rules and why? What is the relevance of UN transfer pricing guidelines in Zimbabwe?

ANNEXURE 5: Document Review List

Summary of Documents Reviewed

Document	Name of document	Background	Category	Source
D1	Income Tax Act (ZW)	Articulates the Zimbabwean transfer pricing rules	Legislation	ZIMRA Website
D2	Finance Act (ZW)	Articulates the Zimbabwean transfer pricing rules	Legislation	ZIMRA Website
D3	OECD transfer pricing guidelines	Inform of the transfer pricing perspective at international level	International guidelines	OECD Website
D4	United Nations transfer pricing guidelines	Comparison of the transfer pricing guidelines with the OECD	International guidelines	United Nations Website
D5	CF (Pvt) Ltd Vs ZIMRA	Inform the transfer pricing strategies and magnitude of problem	Court case	Internet
D6	Kenya Unilever case	Inform the transfer pricing strategies and magnitude of problem	Court case	Internet
D7	SABMiller case study	Inform the transfer pricing strategies and magnitude of problem	Case Study	Internet
D8	National Budget Statement 2017	Inform Zimbabwean policies	Budget statement	Internet
D9	National Budget Statement 2018	Inform Zimbabwean policies	Budget statement	Internet

ANNEXURE 6: All Document Groups and Quotation Count

All Document Groups and Quotation Count

Document	Document Groups	Quotation Count
ZIMRA Interview 1	ZIMRA	47
ZIMRA Interview 2	ZIMRA	33
ZIMRA Interview 3	ZIMRA	46
ZIMRA Interview 4	ZIMRA	36
ZIMRA Interview 5	ZIMRA	45
ZIMRA Interview 6	ZIMRA	49
ZIMRA Interview 7	ZIMRA	41
ZIMRA Interview 8	ZIMRA	35
ZIMRA Interview 9	ZIMRA	17
ZIMRA Interview 10	ZIMRA	20
TAX CONSULTANTS INTERVIEWS		
TC Interview 1	TAX CONSULTANTS	40
TC Interview 2	TAX CONSULTANTS	12
TC Interview 4	TAX CONSULTANTS	9
TC Interview 5	TAX CONSULTANTS	11
TC Interview 6	TAX CONSULTANTS	53
TC Interview 7	TAX CONSULTANTS	23
MINISTRY OF FINANCE INTERVIEWS		
MOF Interview 1	MINISTRY OF FINANCE	10
MOF Interview 2	MINISTRY OF FINANCE	14
MOF Interview 3	MINISTRY OF FINANCE	15

ANNEXURE 7: Ethical Clearance Certificate

UNISA COLLEGE OF ACCOUNTING SCIENCES ETHICS REVIEW COMMITTEE

Date 2017-06-21

Dear [redacted]

ERC Reference
2017_CAS_027

Name : Ms E Mashiri
Student/ Staff #: 50879898

Decision: Ethics Approval from 2017-06-21 to 2020-06-20

Main researcher: Ms [redacted]
eukerjas...@gmail.com

Working title of research:

Regulating Multinational Enterprises' (MNEs) transactions to minimise tax avoidance through transfer pricing: The case of Zimbabwe.

Qualification: Postgraduate research

Thank you for the application for research ethics clearance by the Unisa College of Accounting Sciences Research Ethics Review Committee for the above mentioned research. Ethics approval is granted for three years.

The application was reviewed by the College of Accounting Sciences Research Ethics Review Committee on 20 June 2017 in compliance with the Unisa Policy on Research Ethics and the Standard Operating Procedure on Research Ethics Risk Assessment, and approved.

The proposed research may now commence with the provisions that:

1. The researcher(s) will ensure that the research project adheres to the values and principles expressed in the UNISA Policy on Research Ethics.
2. Any adverse circumstance arising in the undertaking of the research project that is relevant to the ethicality of the study should be communicated in writing to the College of Accounting Sciences Research Ethics Review Committee.

3. The researcher(s) will conduct the study according to the methods and procedures set out in the approved application.
4. Any changes that can affect the study-related risks for the research participants, particularly in terms of assurances made with regards to the protection of participants' privacy and the confidentiality of the data, should be reported to the Committee in writing, accompanied by a progress report.
5. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study. Adherence to the following South African legislation is important, if applicable: Protection of Personal Information Act, no 4 of 2013; Children's act no 38 of 2005 and the National Health Act, no 61 of 2003.
6. Only de-identified research data may be used for secondary research purposes in future on condition that the research objectives are similar to those of the original research. Secondary use of identifiable human research data require additional ethics clearance.
7. No field work activities may continue after the expiry date of this certificate.

Note:

The reference number of this certificate should be clearly indicated on all forms of communication with the intended research participants, as well as with the Committee.

Yours sincerely,

Ms L Grebe
Chair of CAS RERC
E-mail: grebel@unisa.ac.za
Tel: 012 429 4994

Prof E Sadler
Executive Dean CAS

URERC 25.04.17 - Decision template (V2) - Approve