the French subsidiary will be extremely benefited from the supervening event, as the situation changes and an Italian subsidiary of the MNE decides to engage in the production of the cosmetic. The intangible developed was of restrict use, solely relevant for the Brazilian and Bolivian local market, this extremely successful cosmetic application for the poison of the snake. Hence, while, in principle, the entity wishes to keep all the rents derived in the future exploitation of the intangible, the report is permeated by statements that imply that the Brazilian company will never be free from the contract it signed with the French subsidiary, and a remuneration for the exploitation of the intangible produced.

Consider now a similar situation, but this time between parties under common control. In the very same example, if the Brazilian company were the subsidiary of a US-based MNE, it could be possible that the group as a whole would have no interest in developing the intangible in question, as already contained in the contract. As long as all the parties of the group are in a similar position, the company could choose to use the assets of the subsidiary or the group, under the very same conditions described in the uncontrolled example, leading to an ownership of an intangible to the Brazilian subsidiary. In the same conditions as in the previous example:

How would these controlled transactions be treated for transfer pricing purposes? Under the AUS, the French subsidiary should be remunerated equally in both examples, if the transactions concerned are identical. To be sure, the entity is not interested in developing the referred intangible, there are reasons to believe that the location of the transaction would not be altered in each case.

The report puts into perspective the legal ownership of intangibles, taking it as a means "using put for any transfer pricing analysis of transactions involving intangibles". 

Indeed, some approaches contended in the OECD “Guidance on Transfer Pricing Aspects of Intangibles”[2. OECD (2014), Guidance on Transfer Pricing Aspects of Intangibles: the Guidelines in Breach of the Convention, OECD/G20 Base Erosion and Profit Shifting Project, Draft Guidance (18 September 2019), page 42.] would try to harmonize the 50-year experience on ALS (and the existence of more than 3,000 treaties in force providing for such standard). The main discussions are based on arguments that cannot be explained under the ALS. More dramatically, the intent to combat BEPS has led to suggestions that, if applicable, would completely obfuscate the application of these concepts. This is probably the case of the "income approach", as it may be possible that the group is not interested in maintaining the intangible by merely considering its potential use, or profits, and which it has no interest in having the entity for which it is engaged in the transactions to remunerate. Hence, as a general rule, the intangible is considered as a "market good", and the entity engaged in the transactions is considered as a "market participant".

However, even if, as in the given example, the Brazilian company adequately remunerates the French company for the services performed, assets used, and risks assumed, the income of the legal owner related to the intangible may be positive, negative or zero depending on the facts of the case. Indeed, some approaches contend that the Guidelines are intended to apply to the case of an "arms-length" transaction, but not all of the conditions described in the uncontrolled example, leading to an ownership of an intangible to the Brazilian subsidiary. In the same conditions as in the previous example:

It is not a exaggeration to consider that, in fact, the report fallible in its application of the OECD “Guidance on Transfer Pricing Aspects of Intangibles”, notwithstanding the many addendums and amendments made to the original version. As a whole, the interaction between the Guidelines and the underlying tax treaty rules is a matter of ongoing discussion and further research.
The Italian subsidiary will be interested in paying for the outcomes of the intangible produced, and the Brazilian company is the legal owner of the intangible, since it has funded the development of the asset at arm's length. However, some statements of the proposal demand a second look on the issue. As per the OECD proposal, the entities benefiting from these unexpected ex post returns “may or may not be the legal owner of the intangible, and may or may not be the entity or entities providing funding for the development, extension, maintenance, protection, or exploitation of the intangible” (OECD 2014, Guidance on Transfer Pricing Aspects of Intangibles, at 8.6.5). This example seems enough to demonstrate that BEPS initiative may be deviating from ALS. This is extremely dangerous, if one considers that this change in practice affects all treaties in force. One can expect the OECD to be aware of this fact and this explains the reason why the OECD does not clearly declare that the ALS shall not be applied to intangibles. This would be a honest approach, but would certainly not be a practical solution, unless all countries would agree in changing their tax treaties in order to adopt an exception to the existing rules present in Article 9 of OECD-MC. The OECD itself does not seem to believe that this consensus could be reached, and therefore the BEPS Action 14 Multilateral Agreement does not even to touch this problem. In fact of such circumstance, the OECD found an alternative, other than extending the interpretation of Article 9 (and therefore of the ALS). This would not be the first time in which the OECD, in face of a concrete problem of its Model, decides to change its commentary, under the excuse of mere clarification. Such extensions are hardly acceptable under international law, especially when one takes into account that the OECD claims that modifications of the commentaries should be applied ex post facto, under the dynamic approach. One can certainly agree that this allows a broad range of valid interpretations, what can be seen by the variety of national transfer pricing rules, all of them claiming to comply with this standard. However, as the example above shows, the BEPS initiative on intangibles seems to go too far and its suggestions have left the ALS aside. Its dynamic interpretation can be accepted when a modification in the core of a treaty rule is suggested.

The problem of intangibles, as already mentioned, cannot be quantified. What is real is that MNEs presently have profits in jurisdictions where no significant function is performed and no presence in market justifies such results. If this is the problem, one can ask why not to face this specific problem – allocation of profits to low tax jurisdictions – instead of disrespecting all tax treaties in force. It is true that the definition of a low tax jurisdiction is not easy, and several countries, including OECD Member States, have special tax regimes which would attract profits to be allocated thereto. However, this is an issue which can be solved through other actions (Action 6). For instance, Brazil and Portugal renegotiated their tax treaty to exclude from its benefits the Madeira zone, due to the tax regime available therein. Exclusion of benefits and more strict deduction rules for payments to companies under special regimes (even indeducibility) could be a remedy strong enough to combat BEPS through tax treaties. The present OECD goes much further, and together with valid BEPS proposals, creates millions of non tax driven transactions within MNEs, which similarly violates the principle of proportionality, and moreover creates uncertainty for legitimate transactions as well.

In any event, it is clear that the proposals presented by the BEPS initiative cannot be derived from a correct application of the ALS, and this cannot be justified under the principle of equality, as to be a problem of very specific cases (i.e., the use of low tax jurisdictions in the allocation of intangibles). If the proposal, upon delivering larger discretion to tax authorities, “may or may not” lead to a fair allocation of the revenues, one thing is certain: the proposal is surely in breach of the OECD Model Convention.