

A Long Long Way to Win-Win?

-- IPR Issues in Technology Transfer from US to P.R. China

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Abstract:

Our world is full of technology export and import stream. Today under the trend of globalization it's the time for both developed countries in and developing countries to play important roles in the global stage. The best perspective is so-called win-win situation²—in my understanding, every participant will gain benefits and it's a matter of fact that some of them benefit more and some do less.

The IPR issues are so important because they relate to every person's everyday life. People in China could enjoy the happiness from the latest-launched i-pod by **Apple**, a famous American IT company who built its far east headquarter in the CBD of Beijing. And by technology transfer, many companies with more advanced technology power in the US absorb considerable profits all over the world, especially in the tremendous market in China. As we see, intellectual property rights (IPRs) are really crucial guarantees for those right holders who pay lots of efforts into their technology.

Recently, the Win-Win situation is a very frequent phrase quoted in Chinese President Hu Jintao's public speeches³ on his diplomatic visit to US. However, for both US and China, the reality about IPR issues is far more complex. In this article, I will explore my discussions and findings from the aspects of the past, the current and the future then answer these questions:

- With the booming rise of its national technology industry, is China still remaining as an IPR victim in the technology transfer from US?
- What approaches, in my view, are able to bring US and China to “a happy ending”—Win-Win in reality?

Especially based on the second question above, my research only focus on the current

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² Please refer to <http://edition.cnn.com/2006/POLITICS/04/21/hu.visit.ap/index.html>

Also, the whole speech content of Chinese President Hu Jintao at Yale University on 21 April 2006 can be found at the website of Chinese Central People's Government

http://www.gov.cn/lhd/2006-04/22/content_260592.htm

³ Ibid.

Chinese IP legal policies and framework, but also on a recent merger of two well-known industrial enterprises as a case study involving both US and China to predict the future panorama. And, as normally not contained in US-Sino IP analysis, I adopt ancient Chinese sages Confucius' and Sun Tzu's theories as methodology to analyze both legal culture and enterprise strategy issues. And I need to emphasize that a better understanding in each other's social and legal culture under the superficialities is a key point to reach eventual "happy ending". Finally at the end of this article, legal-wise, commercial-wise and cultural-wise, I will bring forward my own suggestive approaches to achieve Win-Win situation for both US and China.

I. Introduction

1 Definition and Forms of Technology Transfer

If we put in the key word "technology transfer" onto the search engine at www.google.com, instantly we will get hundreds of web links that contain their definitions. The definition from Wellcome trust⁴, for example, technology transfer is defined as "the process of transferring research into the commercial environment."⁵ However, in my article, the thorough study of issues related to this concept in the international scope will focus on the communication or transmission of a technology from one country to another⁶. The forms of technology basically are carried out directly or indirectly, and there are some instances as follows:

- *Foreign licensing;*
- *Technical consultancy;*
- *Acquisition of capital goods, international subcontracting, and joint ventures;*
- *Foreign direct investment — operate in two steps. First, there is the transfer to an initial acquiring organization (usually a multinational subsidiary);*
- *Trade journals and technical papers in international journals, and through technical visits and participation in seminars, conferences and trade fairs.*⁷

⁴ <http://www.wellcome.ac.uk/aboutus/whatwedo/>

⁵ <http://www.wellcome.ac.uk/node7351.html>

⁶ <http://www-personal.umich.edu/~alandear/glossary/t.html>

⁷ These five forms are summed up from an article in general knowledge of technology transfer on the website of Science and Development Network.

<http://www.scidev.net/quickguides/index.cfm?fuseaction=dossierfulltext&qguideid=6>

2 Significance: Why Does Technology Have to Be Transferred into Developing Countries such as China?

A. From Poverty to Profits

Most developing countries hold agriculture and manufacturing as their pillar industries and their economics are mainly relying on the income from export trade. Meanwhile, the existence of IP accelerates a huge profit-making and economic-rising possibility for nations who keep in leading positions in technology innovation. In my view, transferring technology into China could strengthen its national manufacturing capacity, increase its technology innovation and create an opportunity to make property history.

B. The Globalization Trend

Generally speaking, I reckon China takes the trend of globalization as a chance instead of a threat. From a recent governmental report regarding the strategy of informatization from 2006 to 2020, we can see China is very motivated and determined in its industrial restructuring procedure and this has been recognized as the first step on the road to Globalization.⁸ In 2002, in a report concerning globalization from International Monetary Fund, four aspects of globalization have been pointed out as trade, capital movements, movement of people and spread of knowledge (technology).⁹ Especially, on the last aspect, this report predicts spread of technology in globalization will be very important for developing countries:

*Information exchange is an integral, often overlooked, aspect of globalization. For instance, direct foreign investment brings not only an expansion of the physical capital stock, but also technical innovation. More generally, knowledge about production methods, management techniques, export markets and economic policies is available at very low cost, and it represents a highly valuable resource for the developing countries.*¹⁰

3 The Poking Angles of This Article

⁸ , *The Strategy on the National Informatization Development from 2006 to 2020*, March 19, 2006, General Office of the CCCPC and the General Office of the State Council and the content of this report is written in Chinese.

http://www.gov.cn/gongbao/content/2006/content_315999.htm

⁹ By IMF staff, *Globalization: Threat or Opportunity?* April 12, 2002

<http://www.imf.org/external/np/exr/ib/2000/041200.htm#II>

¹⁰ Ibid.

A. Research Scope: US-Sino Trade Relations

China and US has built up a tight connection by their interactive trader relations. And these relations contain many aspects of industries, such as electrical machinery, power generator equipment, cotton, iron and steel etc.¹¹ In a recent report from International Information Programs of US government, it has been recognized that US-Sino trade has been played a significant role in development of both countries:

Even while the U.S. bilateral trade deficits with China soars to the dismay of import-sensitive domestic industries and their representatives in Congress, China has become the fast-growing market for U.S. good exports China has become the world's third-largest exporter and third-largest importer, an economic power importing raw materials and scrap from all the world's region, drawing vast amounts of foreign investment and changing the economic landscape around the world, especially in Asia.¹²

Thus, the research in this article is based on the IP issues in technology transfer in US-Sino scope and I also regard it as a typical reflection of the same issue occurred in the technology transfer from developed countries to developing countries.

B. The Focal Points

For a long time, tons of debates and arguments have been poured onto the complicated issues in the US-Sino IP issues. The focal points in this article will demonstrate some fresh air on a combination of different elements mainly on theories and facts from China's perspective. All in all, I hope this analysis will bring people a more open and rational understanding regarding the topic.

II. China's IPR--Started from Zero

1 The Condition of IPR Review--China's National Characteristic

When we are studying a nation, actually we could focus on its people. In China there live 56 ethnic groups with a total population of 1.248 billion¹³. Honestly speaking, every single Chinese is unique and different from others. Meanwhile, inevitably, each Chinese carries more or less the characteristic of the local racial, cultural and geographical environments etc. Currently, people from Han Race make China's and

¹¹<http://www.uschina.org/statistics/tradetable.html>

¹² See Bruce Odessey, *Swiftly Expanding U.S.-China Economic Relations Stir Debate—Fast growing export market also accounts for biggest trade deficit*
<http://usinfo.state.gov/eap/Archive/2005/Mar/03-588739.html>

¹³ The figure of the population is counted at the end of 1998 and it does not include figures of Hong Kong, Macao and Taiwan.
<http://www.china.org.cn/e-groups/shaoshu/mix.htm>

the world's largest ethnic group--91.96 per cent of the country's population.¹⁴ Therefore, my analysis of cultural factor of Chinese IPR will base on the characteristic of Han race. There are two men with great influences in China generation after generation--Confucius and Sun Tzu. I reckon, they are supposed to be the founders of Chinese way of thinking and doing and they are still influencing people's living nowadays at every corner of modern China.

A. Confucius-- the Great Founder of Traditional Chinese Social and Cultural Standards

(1) Who Is He?

Confucius (551-479 BCE), according to Chinese tradition, was a thinker, political figure, educator, and founder of Confucianism. His teachings, preserved in the *Analects*, form the foundation of standards in Chinese traditional education and ruling of governments¹⁵.

(2) Confucius' Social and Political Philosophy

“*Ren*”¹⁶ has been the central concept in the social aspect of Confucianism. It delivers a method of “compassion” or “loving other people”. And the golden rule made by Confucius are two: “What you do not wish for yourself, do not do to others;”¹⁷ “Since you yourself desire standing then help others achieve it, since you yourself desire success then help others attain it.”¹⁸

Confucius advocates that the ruler of a kingdom should lead and guide his people by setting moral role model by his own remarks and behaviors.

If the people are led by laws, and uniformity among them be sought by punishments, they will try to escape punishment and have no sense of shame. If they are led by virtue, and uniformity sought among them through the practice of ritual propriety, they will possess a sense of shame and come to you of

¹⁴ Ibid.

¹⁵ <http://plato.stanford.edu/entries/confucius/>

¹⁶ Ren is the Pinyin pronunciation in Chinese language which equals “loving and caring others” in English.

¹⁷ Confucius well-know mottoes were collected and written in a book named *Analects* by Lao Tzu, an inheritor of Confucius. In 19th, *Analects* was translated by James Legge into English. The quoted part can be found in Chapter 12, *Analects*. <http://www.isop.ucla.edu/eas/documents/lunyuCh12.htm>

¹⁸ See Chapter 6, *Analects* <http://www.isop.ucla.edu/eas/documents/lunyuCh6.htm>

*their own accord.*¹⁹

(3) Assessment of Confucius' Influences in IP Scope

It seems that there's nothing related between Confucius, a man who died 2000 years ago with current Chinese people's opinions about IPR. But through my observation and study of both of them, amazingly I find there are positive and negative ties from Confucianism in people's heart to IP. Let's look at what they are:

a. Two Positive Points

i. The Initiator of "Win-win" Theory in Chinese Culture

I believe that one of widest-known motto by Confucius is "Since you yourself desire standing then help others achieve it, since you yourself desire success then help others attain it."²⁰ In Confucius' time, each duke of different tributary states in the Zhou Dynasty was busy with spreading their territories and drilling their armies for more dominant positions.²¹ Confucianism was the outcome of aiming to end this chaotic situation. It requires rational attitudes from each party of the conflict—"loving each other and caring each other's interests". And in a peaceful way, this provides a possibility to solve the dissension in a much softer and compromising way. Even in today's negotiation of technology transfer contract, assumingly, people are possible to reach a consciousness of Win-Win.

ii. "Ren" Supported up the Continuance of China

In my opinion, the "Ren" ideology supports up the development of China in the last thousands of years. Although none of the dukes in tributary sates at Confucius' time had bought his theory when he was alive, after Confucius' death, almost each emperors of ancient China advocated Confucianism to strengthen their reigns, and one of a good example is the "Ren ruling" in Tang Dynasty.²² After reviewing the Chinese history, we can easily find that Confucianism help the rulers to keep the society stable and get rid of dissidents. And for a huge agricultural country like China, the emphasis of respecting, caring and helping each other are supposed to be very efficient in farming laboring where each family work as an individual working unit--family members live together or very close, reply on each other, fight against the natural

¹⁹ See Chapter 2, *Analects* <http://www.isop.ucla.edu/eas/documents/lunyuCh2.htm>

²⁰ Op. cit 18

²¹ http://en.wikipedia.org/wiki/Spring_and_Autumn_Period

²² <http://www.chinaiiss.org/history/dynasty/14.htm> (content was written in Chinese)

disasters and share the outcome of work all together²³. And I assume this feature leads to the basis of Chinese national characteristic--the collective consciousness²⁴.

b. Two Negative Points

i. "Deprecating oneself"²⁵ Might Drag Innovation

I doubt if a person is deprecating himself/herself, this person might pay more attention, care and respect to the experienced and seniors. Thus, it will lead to an inapposite situation: people might lower their self-esteem and follow the opinions of the seniors and be not willing to express their new ideas. And in my eye, from IP's aspect of view, this deprecating-oneself attitude might discourage people from innovation and harm the whole nation's intellectual property development.

ii. "Ren" vs. IP Enforcement

IPR will be only a right on paper if there is no strong IP enforcement to fulfill it. As Roma cannot be established overnight, it takes time for China to complete a systematic network in IP protection. And I think in the executive procedure of IP enforcement, the ideology of "Ren" should not be given much space.

B. The Grant Master of Strategy—Sun Tzu

(1) Who Is He and His Five Elements for Win-Win

On 20 April 2006, a copy of *The Art of Strategy*²⁶ was handed to US President George Bush by Chinese new President Hu Jintao as a present²⁷. It is not only a copy of an ancient book, there are supposed to be certain indication and profundity behind the scene. I guess—the Chinese new leader indicates that there is a way to achieve Win-

²³ This opinion was concluded from my personal live-in experience in observing the working habits of peasants in Tang Mazhai Village, Liaoyang City, Liaoning Province, China, in July 2002

²⁴ From an interview from Professor Zhiwu Chen (School of Management, Yale University) about influence of collective consciousness can be found in the following website. And in this interview, he pointed out at current stage the collective consciousness is an important guarantee for the high-speed development in the China financial market.

<http://finance.sina.com.cn/jingjixueren/20040920/08001034092.shtml>

²⁵ This point was summed up from Chapter 1 of Analects

<http://www.isop.ucla.edu/eas/documents/lunyuCh1.htm>

²⁶ It has another name The Art of Strategy. Sun Tzu's primary aim writing this book was to teach strategy in different wars. In the modern society, this work has been more commonly used in business strategy planning. Therefore, I personally hold a view that the name The Art of Strategy is more suitable for Win-win analysis in this article.

²⁷ <http://www.timesonline.co.uk/article/0,,11069-2142011.00.html>

Win with US as ancient Chinese sage Sun Tzu once said “winning without fighting is the best strategy”²⁸.

Sun Tzu is the author of this book. Why is his work still popular in China today? The reason can be described like this— I reckon Chinese people find it is more practical and specific than Confucianism not only in diplomatic and international relation fields, but also works very well in economic construction and business development.

In the first Chapter” Laying Plans”, Sun Tzu says:

The art of war, then, is governed by five constant factors, to be taken into account in one’s eliberations, when seeking to determine the conditions obtaining in the field.....and these are (1) The moral law;(2) Heaven;(3) Earth;(4) The Commander; (5) Method and discipline.”²⁹

In the following setions of this article, I will analyze current IP issues in US-Sino technology transfer and point out solutions combined with fresh modern application for Sun Tzu’s strategy.³⁰

2. Modern Application of Ancient Sun Tzu

A. “Heaven” + “Earth” + “ The moral Law”³¹

Heaven signifies night and day, cold and heat, times and season Earth comprises distances, great and small; danger and security’ open ground and narrow passes; the chance of life and death The moral Law causes the people to be in complete accord with their ruler, so that they will follow him regardless of their lives, undismayed by any danger.³²

These three elements seems not very down-to-earth and even confusing, but if we put what the government of Tianjin City contributed to Sino-Chinese technology transfer, unsurprisingly we might see these three elements of Sun Tzu’s theory has already received a positive outcome in promoting the direct US investment into China which remains a main measure in technology transfer.

(1) “Heaven + Earth”— Good Investment Environment

²⁸ Ibid.

²⁹ See Article 3 and 4, *Art of Strategy*.

<http://artofwar.thetao.info/china/text.htm>

³⁰ In my literature review, I find Sun Tzu’s strategy has been used in some business articles regarding IP issues. However, in this article, I will bring a fresh integrated analysis of China’s government policy and actions, legal framework and enterprise strategy though *The Art of Strategy*.

³¹ See Article 3-8, *Art of Strategy*.

<http://artofwar.thetao.info/china/text.htm>

³² Ibid.

Here I take mode of Tianjin government as an example. For Tianjin City, “Heaven” and “Earth” means the exterior conditions for its economic development such as geographical factors. Tianjin government is good at knowing both its advantages and disadvantages. On the official website of Tianjin Economic-Technological Development Area (TEDA), we can browse “Ten Reasons Why to Invest in Tianjin” and they seem to be convincing to foreign investors. And Tianjin government emphasized its strong industrial and manufacturing capabilities as follows:

As an important economic center and one of the four municipal cities under the direct jurisdiction of China's Central Government, Tianjin is prestigious of her complete categories of industry and rich industrial foundation, which supports greatly for TEDA an ideal environment for manufacturing supply chain, R&D and human resource Tianjin is also the origin of Chinese modern industry as well as the major comprehensive industrial base of this country. The industrial output contributes more than 50% to Her GNP. Totally there are 150 industrial categories with 10,000 enterprises, majoring in electronic, automotive, metallurgy, machinery, chemical, textile and medicine industries. Besides, a complete industrial service system has been formed here.³³

Meanwhile, the disadvantage of Tianjin, in my view, is that many overseas investors, especially US business people and tianjin enterprises hardly have the channels to gain an intimate contact or observation to each other, in other words, they need a bridge to communicate and to business together. Thus, Tianjin becomes one of few Chinese cities that have built up their overseas investment promotion offices in US. Currently it has three main regional offices in New York City, Chicago and California.³⁴ Generally, it promotes US enterprises and commercial organizations to visit Tianjin, helps with US-Tianjin trade exhibitions and disseminates supportive government policies toward foreign investment and joint ventures³⁵. Therefore, we can see, although there is a huge Pacific Ocean between Tianjin and US, although it's commonly viewed that people from different cultures are difficult to co-operate, Tianjin Foreign Investment Bureau has already created the “heaven” and “earth” elements for Win-Win and turned the impossible to possible.

(2) “The Moral Law”—Foundation of Trust

In Sun Tzu's time, “the moral law” has more meanings in the military field—to win soldiers' hearts and devotions—they can complete in accord with their commanders regardless their life or any difficulties. Nowadays, about business, in my view, “the moral law” element reflects the situation that both parties of the business should give credit to each other and reply their co-operation on the basis of trust. Therefore, a question comes up—how do both parties in the technology transfer get to know each other and establish a sense of trust? Is there a need for a relatively neutral party to

³³ <http://en.investteda.org/whyteda/governmentssupport/default.htm>

³⁴ See Official website of Website of Tianjin Foreign Investment Promotion Bureau <http://www.investteda.org/gywm/lxwm/default.htm#ny>

³⁵ Ibid.

demonstrate a good will for foundation of trust? In my research, I find that the mode of Tianjin government could be the approach of this question and its overseas investment offices play an important role in support up US-tianjin trade as mentioned in the above section. In my recent email interview to one of the foreign investment promotion officers from Tianjin Foreign Investment Promotion Bureau, she commented her office in the US as follows:

Chinese companies trust the projects our offices introduced or promoted, but not totally rely on us. For US investors, for example, usually they pay more attentions to these enterprises that are introduced by our office. There are two reasons; the first one is that US investors are not very clear about the local environments in China and they need reliable consultants; Secondly, the main task of our office is to explain supportive government policies and different advantages of Tianjin, such as privileged taxation reduction regulations for joint ventures and Tianjin's merits on transportation in international trade; And our task will end if both business parties get into a further stage, for instance contract negotiation—in other words, we do not interfere but only build a channel for US-tianjin trade.³⁶

Then, let's evaluate whether Chinese and Americans both found good credits in each other—I assume the establishment of real business will be supposed to be a proof. Among many overseas busy-running companies in TEDA, the settle-downs of two famous US enterprises may be viewed as a positive sign--Motorola (China) Electronic Co., LTD and Tianjin Coca-Cola Co., Ltd:

11 years ago, Motorola chose TEDA as her relocation place under the gaze of suspicion Motorola is the largest wholly-owned foreign invested company in China. During its development of electronic & telecommunication industry in China, then it has created makes the name a synonym of pager and mobile phone. Motorola is a successful mode in China for other foreign invested companies.³⁷ Secondly, Tianjin Coca-Cola Co., Ltd: The company introduces the modern manufacturing and supporting system, adopts advanced management and operation strategy so that to make sure the strict control and complete management upon the producing techniques, quality control, marketing and after-sale service³⁸.

B “Method + Discipline”³⁹—an Overview of China IP Framework

Regarding the function of “Method and Discipline”, Sun Tzu says:

By method and discipline are to be understood □ marshalling of the army in its proper subdivisions, □ the graduations of rank among the officers, the maintenance of roads by which supplies may reach

³⁶ These remarks are quoted from my recent email interview with a Foreign Investment Promotion Officer, Bureau of Foreign Investment Promotion, Government of Tianjin City, P.R. China on May 12 2006. The content of this interview is in Chinese language and translated into English by myself. And the name is concealed as required by the interviewee.

³⁷ <http://en.investteda.org/aboutteda/keyindustriesbrief/default.htm>

³⁸ Ibid.

³⁹ Article 10, Chapter 1, *The Art of Strategy*
<http://artofwar.thetao.info/china/text.htm>

*the army, and control of military expenditure*⁴⁰.

Today, in China, to interpret ancient knowledge above into a modern understanding in IP scope, we might ask—what is the contemporary “method and discipline”? Until mid-90s, China almost completed its IP protection system. In my point of view, these newly established laws are IP “methods and disciplines” so that each party of IP anticipants could have rules to follow, for example, courts are able to have rules to make decisions and IPR of US technology transferors can be protected under Chinese law.

Current Chinese IP protection system has been constructed in both vertical and horizontal level in the past twenty years. In vertical level, IPRs are protected at Central Government, provincial governments, cities and county councils. In horizontal level, IPRs are strengthened up by different governmental and non-governmental organizations including legislative committees, courts, law enforcement departments, Administration for Industry and Commerce, Administration of Taxation, Customs, police forces, educational institutions and enterprises etc.

Regarding the internationalization of Chinese IP Law, China’s current IP legislative system mainly contains three parts--laws, administrative regulations and department rules. And according to both the issues arising from reality and the demand to join in WTO, China made necessary amendments and updated its IP laws to catch up with the requirement of TRIPS:

*For example, the amended Trademark Law of the P.R. China and its implementing regulations have extended their protection scope so that more objects can be protected as trademarks. They contain special provisions for the protection of geographical indications and well-known trademarks, add regulations concerning the right of priority, and judicial reviews over administrative determinations on trademarks, and also strengthen the investigation and punishment against infringement.*⁴¹

C. “The Commander”⁴²—the Element of People in IP Scope

In Sun Tzu’s core elements to Win-Win, he regards the influence of a competent commander is crucial. In my opinion, this concept could be enlarged to the people element in modern IP system because teamwork and co-operation are more and more important in the global scope. IPR are created by people and for people, and also need people to execute. We can see on every point of the chain to fulfill IPR, the influence of people is quite important.

⁴⁰ Ibid.

⁴¹ The up-dated articles in Trademark Law of P. R. China have been summed up in *Status regarding Legislation in terms of IPR in China*, Department of Treaty and Law, Ministry of Commerce of P. R. China, March 24, 2005 <http://tfs.mofcom.gov.cn/aarticle/zcfb/200503/20050300029076.html>

⁴² Article 9, Chapter 1, *The Art of Strategy* <http://artofwar.thetao.info/china/text.htm>

Let's turn to the solution of issues happened in the US-Sino technology transfer. IP enforcement is needed being strengthened in both US and China, but, as a newly accepting-IP country, China seems to have more burdens on its IP enforcement. How to strengthen the enforcement? I suppose, the people factor is the key. Many training and IP knowledge classes have been promoted in different organizations to improve the protection awareness of the whole nation. And the function of Committee of Residents⁴³ (similar to community centers in western countries) in both urban and rural areas should not be ignored. As mentioned in an annual report from Hebei Province Government, Committees of Residents have been very helpful in crackdown actions and raids to IP infringing assembly lines and distribution channels, and this positive aspect should attribute to its co-operation with police force on neighbor watches of private rent houses or apartments in suburbs.⁴⁴ Also, combined with analysis of Chinese culture in the previous chapter, the close connections between people might be the other reason why Committee of Residents works well in IP enforcement.

III. Case Study: IBM Marries Lenovo⁴⁵

1 A Short Brief

Almost unknown outside China before 2005, in China mainland, since its establishment in mid-80s, Lenovo has been a famous name and many Chinese people regard it as a flag of national industry. Then in 2005, it became an international company through merging with IBM PC Unit. The deal was not small: Lenovo paid \$1.25 billion and it also got almost 10,000 IBM employees including IBM CEO Stephen Ward⁴⁶. In this chapter, through studying the whole deal between US IBM and China Lenovo, I will assume the IP strategies of both parties and try to find that a Win-Win situation is supposed to be very possible in the US-Sino technology transfer.

2. The Role of Calculation

In Article 26 of Chapter 1, Article 2 of Chapter 3 of his work, Sun Tzu says:

Now the general who wins a battle makes many calculations in his temple ere the battle is found. The general who loses a battle makes but few calculations beforehand. Thus do many calculations lead to

⁴³ In China, the Committee of Residents is a voluntary organization of residents in a certain area. Generally, its daily activities include neighbor watch, social care, educational classes and charity work etc.

⁴⁴ *Report on Improvement of IP Enforcement in Hebei Province*, Hebei Provincial Office of Rectification and Standardization of Market Economic Order, April 20, 2005

<http://www.hecom.gov.cn/zhengguiban/DispFiles.aspx?DocID=7009>

⁴⁵ <http://www.lenovo.com/lenovo/us/en/>

⁴⁶ See Lawrence M. Walsh, VARBusiness, Thursday, January 05, 2006, *Lenovo's Shakeup Surprise, Shifting Leadership Signals Big Changes at the Ambitious PC Maker*.

<http://www.varbusiness.com/sections/columns/columns.jhtml?articleId=175700667>

*victory, and few calculations to defeat: how much no calculation at all! It is by attention to this point that I can foresee who is likely to win or lose Hence to fight and conquer in all your battles □ is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting.*⁴⁷

Therefore, we need to see before the IBM-Lenovo deal was done, there were supposed to be cautious calculations from both parties, and most of the concerns must be IP-related. Let us analyze what they might be and how they have been measured and balanced:

A. IBM: Why Lenovo?

(1) Alliance Might Form Possibilities in China Market

In China market, IBM finds Lenovo, the world's third-largest maker of personal computer,⁴⁸ specializes in consumer PCs and low-cost manufacturing.⁴⁹ It dominates the PC market in China, with a 27% share in 2003⁵⁰ and has its own connections with distribution network have spread the whole China.

Let's also study two distinctive features of China market and they are supposed to be the reasons why IBM chose Lenovo: Firstly, China market is huge; Secondly, Chinese consumers have their own purchase habits that are relatively different from Western customers.

At first, for PC industry itself, China's market is booming since 1999. China has the largest population, and with the fast development of internet users, more and more individuals, families, organizations and companies are equipped with desktops and laptops. This implicates a huge customer potential. IBM is a high tech company with its international focus and it will not miss the opportunity to seize the China market.

Second, Chinese customers have a purchase tradition of "Seeing is believing"⁵¹ and they prefer to purchase products, especially high tech products from reliable retailers by cash rather than on-line shopping or telephone payments by credit cards.⁵² On the contrary, western customers have got used to shop on line by their credit cards and the door-to-door delivery service. In China, although in the last ten years, many young people in big cities have accepted the new way of purchase, there are still large

⁴⁷ Article 26, Chapter 1; Article 2, Chapter 3, *The Art of Strategy*

<http://artofwar.thetao.info/china/text.htm>

⁴⁸ http://www.chinadaily.com.cn/english/doc/2005-09/28/content_481631.htm

⁴⁹ Op. cit 45

⁵⁰ http://www.lenovogrp.com/cgi-bin/main.cgi?section=press&sub_section=20041208_r1_content

⁵¹ This "Seeing is believing" purchase habit is a common sense among Chinese people, including myself.

⁵² See analysis of purchase habits of Chinese customers, *Telephone Payment: A New Product or a New Idea?* http://www.iresearch.com.cn/html/Online_Payment/detail_news_id_32883.html (Content is in Chinese)

amount of customers who would rather go to the retailers themselves and carefully check the products before they pay up the cash. Through the way of selecting, questioning, checking the products by themselves and being able to take the products home immediately after cash payment, I assume Chinese customers guarantee themselves a sense of tangible and secure in the whole purchase procedure. And this also entirely explains why many cities are keen on building up “Digital Harbors” and “Digital Centers” where many IT companies occupy nice-displayed counters with ready-to-sell products in the stock rooms, for instance, the well-known Hailong Plaza in Zhong Guancun area in Beijing, the Zhujiang Road in Nanjing, and Sanhao Street in Shenyang.

Familiar with the above features of China market and customers, Lenovo has been one of the most experienced companies with nationwide retail network for its own products in the last two decades. Therefore, if IBM is alliance with Lenovo, Lenovo’s massive sale teams might save lots of IBM’s energy on product distributions and help IBM to profit in China.

(2) Alliance Might Accomplish “Lower price+ Higher Efficiency”

First, how to get a lower price? For PC product, good quality is one of key factors in winning the market. But for the consumers, I reckon, they are willing to purchase computers not only with guaranteed quality, but also with a lower price. To satisfy the demands from customers, IBM tries to look for the solution of price issues. Then, merger with Lenovo could be a solution. Regarding labor cost, Lenovo’s is only \$3 per desktop PC, and this will save IBM’s operating expense to less than 9% of revenues which are half of the average for the computer hardware business⁵³.

Second, Lenovo staff’s working efficiency impressed IBM. Why? In my view, it can be explained from the historical and economic perspectives of view. After China’s open door policy in 1978, the development of national economics demonstrates many opportunities for Chinese people. But it is still remaining as a developing country and its social, medical and pension welfares are far from perfection. Therefore, in the aim of bettering their living conditions and making full use of oncoming chances to get rid of poverty, people need to not only be good planners, but also do quick actions. This equipped Lenovo staff high efficiency and flexibility that IBM favored in the business environment.

(3) Alliance Might Get rid of a Dilemma

⁵³ See Steve Hamm, Dexter Roberts and Louise Lee, *Lenovo and IBM: East Meets West, Big-Time—Lenovo’s Deal for IBM’s PC Unit Led to a Merger of Talent—and a Threat to Dell*
http://www.businessweek.com/magazine/content/05_19/b3932113_mz063.htm

During a long time, PC unit of IBM hasn't been a good performer⁵⁴. For any company, it is assumed that the best way to develop focusing on its most-profitable products. Meanwhile, in Lenovo, PC has been its "Fist Product"⁵⁵ since its establishment in 1984. Thus, selling PC unit to Lenovo will find it a good place in the future. In addition, after the merger, IBM will get 19% of the new Lenovo that will benefit IBM.⁵⁶ "Overall, this deal is another indicator of how resilient IBM is", says Wharton management professor Mark J. Zbaracki, who was a staff industrial engineer at IBM from 1982 to 1991.⁵⁷

B. Lenovo: Why IBM?

(1) Internationalization

As a well-known company in China, in 1990s, Lenovo had formed its future strategy of internationalization.⁵⁸ But it came across complicated obstacles, and the reason mainly rooted in its lack of international commercial experiences. After the merger with IBM, the new Lenovo will perform as an international company, and it could obtain a strong helper and shareholder--IBM in the global market. Big Blue's 30,000-person sales force and global network of 9,000 business partners will help sell Lenovo PCs⁵⁹. On the other hand, IBM's 19% of new Lenovo will guarantee common interests between Lenovo and IBM. And another point is that, before the merger, Lenovo owned a good reputation and its brand received affections and a good reputation in China. After the merger, new Lenovo is permitted to use IBM's global-well-known trademark Thinkpad for five years⁶⁰ and this could be the first step for customers in international market to know Lenovo.

(2) Improvement of R&D and Decrease of Expensive Loyalty

The shortage of R&D capacity has haunted developing countries as a nightmare for decades. And paying expensive loyalty fees seems to be another heavy burden on developing nations. However, in spite of all difficulties, China has to follow the international IP rules if it wants to join in the worldwide IP competition. With lagged

⁵⁴ *The IBM/Lenovo Deal: Victory for China?* January 14 2005, Knowledge@ Wharton

<http://knowledge.wharton.upenn.edu/article.cfm?articleid=1106&CFID=1473319&CFTOKEN=43413023>

⁵⁵ A traditional metaphor translated from Chinese Pinyin Quan Tou Chan Pin, which means a company's most salable products.

⁵⁶ Op. cit 54

⁵⁷ Op. cit 54

⁵⁸ See the History of Lenovo

<http://www.lenovo.com.cn/about/lenovo/company4516.shtml> (Content in Chinese language)

⁵⁹ See Yong Tang, "We Are Trying Everyday to Make Lenovo A Global Brand"—Interview with Deepak Advani, Senior Vice President and Chief marketing Officer

http://english.people.com.cn/200606/19/eng20060619_275249.html

⁶⁰ Ibid.

research and development capability, how is a developing country such as China able to perform well in the technology transfer negotiation? We could review the recent progresses of Lenovo for a future perspective.

When western high tech enterprises are enjoying the sweetness brought by intellectual property rights, in 1996, Lenovo, the Big Brother in Chinese IT industry owned only one granted patent⁶¹, because Lenovo was stagnating at a very basic stage of PC industry and occupied by computer components assembly and distribution. In the other fields, Lenovo was not doing well. Since 1999 Lenovo established its R&D institute, it started to focus on technical innovation. From 2003 to 2004, it submitted 572 patents applications to China State Intellectual Property Office.⁶² Up to now, Lenovo has nearly 5000 global patents.⁶³ This figure indicates that Lenovo keeps an uprising trend in IP field.

Merging as an efficient way to obtain IP rights in technology transfer, gives Lenovo a new experience to obtain IPRs. Meanwhile, it solves the problems that in developing countries, enterprises have long-time sufferings in the payment of expensive loyalty. In a recent interview on 9 June 2006, Lenovo Chairman Yang Yuanqing remarked the IP issues in this deal as following:

*The most crucial issue of internationalization for a company in the development country like us is intellectual property and the first foreign company we paid loyalty is IBM. In the merger contract with IBM, IBM agreed to transfer more than 1000 granted patents to Lenovo. Actually, during the negotiation, the last finished section was mainly concentrated on IP because it's very important and both parties were full of cautiousness Since merger between IBM and Lenovo, new Levono's income of global loyalty fees increases to around 40,000,000 USD per year.*⁶⁴

It's obvious that Lenovo has accepted the concept and rules of IP and starts to use it as a tool in its corporate operation strategy. In the past, some Chinese enterprises only concentrated on short-term interests, in other words, focused on earning quick money by being IP infringers. In my view, this would only cause more criticism from international society and make Chinese domestic market more chaotic. On top of any issue, mastering the rules and devoting to be lawful players rather than infringers would be a more rational, respectful and beneficial choice. At least, Levono set a possibility for this point.

(3) Management of International Experience

⁶¹ This figure comes from *Lenovo- From Country to City, IP Series Reports of Chinese Enterprises and Strategy*, China State Intellectual Property Office. And the quoted part of this report is translated by myself.

http://www.sipo.gov.cn/sipo/ztxx/zscqbf/zgqyypzl/200605/t20060531_101427.htm

⁶² Ibid.

⁶³ See *We Have Cautious Consideration on IP Issues*, an interview with new Lenovo Chairman Yang Yuanqing. And the quoted party of this interview is translated by myself.

<http://news.sina.com.cn/o/2006-06-12/09099181305s.shtml>

⁶⁴ Ibid.

The shortage of funds, technical facilities hasn't been the biggest obstacle, the lack of human resource with international experience, in my view, has been the most painful issue in China. I assume when we are referring to intellectual property, we not only concentrate on this concept, we are also referring to the people involved in it. Intellectual property is a foreign concept for traditional Chinese people, as I discussed in precious chapters, a management team with merely domestic experience is not supposed to handle the IP issues in both domestic and international scopes. On some extent, merger with IBM will quickly infuse new Lenovo with stronger management teams.

IV. Conclusions, Solutions and Lessons

Concerning on the main topic of this article—is there still a long way to Win-win regarding the IP issues in US-Sino technology transfer, I draw conclusions, approaches and lessons as follows:

1. Is IP remaining as a barrier in the development of developing counties such as China? Is Win-Win approachable? We should see that the diversities in economic development and demands of technology transfer cost China a lot to US and generally China would remain a relatively negative position in the tech transfer negotiation at present. However, with the rise of China's economic, some companies like Lenovo have accomplished the primitive accumulation of capital and try to change the their traditional negative positions. Their actions, for instance, merger with IBM have proved themselves as responsible and lawful players. Thus, a Win-Win situation is possible and no longer just an idea on the paper.

2. How to solve the problems? Each country has its own national characteristic and solutions. By using traditional Chinese knowledge Confucianism to explain the social and people features of China and by adapting Sun Tzu's strategy in modern IP issue analysis, I assume next approaches to achieve Win-Win:

For US, first, careful calculations in business operations are necessary and an open-minded attitude is far more than important. IBM-Lenovo case has proved that Win-Win in IP issues in technology transfer is possible to be achieved and it's based on **US –Sino common interests**. Second, legal, social, economic and cultural diversities between US and China predestines that it must take **time and effort** for both parties to co-operate with each other.

For China, first, knowing its both advantages and disadvantages and maximizing the advantage is the first step, like Lenovo's dominant position in China PC market is a key attraction to IBM; Second, behind IP issues in technology transfer, there are many crucial elements needed to be strengthened in IP strategy:

- “Heaven + Earth”, which reflects of the social and cultural and even investment environments in China;
- “The Moral Law”, which mainly represent the open door government policy and governmental efforts to build good investment atmosphere;
- “The Commander”, which demonstrates the importance of IP management team with international experience; Also I enlarge to this element into people factor at every supporting point of IP protection system, for example, the positive influence of the Committee of Residents to crackdown actions in IP enforcement;
- “Method and discipline”, which means a complete and mature IP protection frame work

Third, especially to many Chinese enterprises, the birth of new Lenovo has set a promising example that competing according to the IP rules is doable and rational for **long-term interests**. And mastering the rules of international treaties and conventions mounts to be a very important task.