The Legal Aspects of the World Bank’s Work on Human Rights

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For Conference Discussion Only.
INTRODUCTORY REMARKS

I am very pleased to have this opportunity to learn about your views on the essential reinforcement that development and human rights must have. Development is precisely what the Bank works for and we believe that this work consistently contributes to the progressive realization of human rights in our member countries.

I also welcome the opportunity to share with you today some initial thoughts about the legal considerations regarding the work of The World Bank with respect to human rights.

One of my first acts on assuming my position, less than four months ago, was to establish a Work Group on Human Rights within the Legal Vice Presidency of the Bank. I should say that the response from our lawyers to my invitation for expressions of interest in serving on this committee was overwhelming. That Group has begun work on the legal framework applicable to the Bank’s work in connection with human rights. It is also developing a matrix of Human Rights and the activities of the Bank – to help us get a better understanding of the interconnections between the work of the Bank and the human rights obligations of our members.
I did this, not only because of my personal conviction that work in this area is a moral imperative, but also because of my sense that human rights are progressively becoming an explicit and integral part of the Bank’s work, just as has happened over the last twenty years with the environment and in the last five years with anti-corruption.

I appreciate that this session is allocated to the reform of legal and judicial systems. The rule of law is indeed a cornerstone of the work of the Bank and over the last decade we have developed a significant portfolio of projects and other activities in this field. However, I believe that concerns and uncertainties about the “constitutional” restrictions under the Articles of Agreement of the Bank have somewhat inhibited a more proactive and explicit consideration of human rights as part our work. I would therefore like to discuss with you today my preliminary thoughts on the nature of our real legal boundaries.

What I have to say falls into three broad parts.

• **First**, I want to discuss the Bank’s legal framework – the Articles. Our framework has limitations – as it should- for it is important to bear in mind that the Bank is a financial institution. As a specialized agency of the UN it has a specific financial purpose and a clearly designated role within the structure of UN institutions.¹ Within these
limitations the objectives of the Institution have been, and can and should continue to be, dynamically interpreted and applied. And thus I find that this legal framework also can be enabling.

• **Second**, and to put this discussion in context, I want to discuss the evolution of the Bank’s role in development. As the world has changed over the last 60 years, so too has the World Bank and its practice. Its emphasis has shifted dramatically from bricks and mortar infrastructure to the large scale inclusion of social development, human development, institutional reform. In other words, the focus of our work has clearly evolved from “hard lending” to “soft lending.” It is clear that with this progress the Bank has made major contributions to the substantive furtherance of a broad array of human rights in a range of fields.²

• **Third**, I will try to articulate my own current thinking about the way forward for the Bank in this area.

I. **LEGAL FRAMEWORK**
The legal framework within which the Bank must operate with respect to human rights as with all its activities is anchored in the Articles of Agreement. They contain important limitations but they have been and must continue to be interpreted so as to achieve the mission of the Bank.

There are three key issues in the Articles which need to be discussed:

(i) First and foremost, all Bank activities must further its purposes. Article I sets out the purposes of the Bank. Drafted as it was in 1944 at the end of WWII it sets out a variety of activities related to reconstruction and development, such as the facilitation of investment capital for productive purposes, the restoration of economies after wars and the development of productive facilities and raising of standards of living.

(ii) Second, the Articles provide that only economic considerations shall be relevant to the decisions of the Bank and its officers, and these must be weighed impartially. When Bank lending is involved, funds must be used without regard to political or other non-economic influences or considerations.³

(iii) Third, there are two distinct political prohibitions:
(a) The Bank and its officers may not interfere in the political affairs of any Member.\

(b) The Bank cannot be influenced in its decisions by the political character of the member or members concerned.\

Let me consider each of these three norms in a little more detail.

A. PURPOSES

Article I sets out the purposes of the institution, drafted as it was 60 years ago, its provisions have stood the test of time. Nevertheless, as the challenges of development have changed the Bank’s mission has also evolved to serve a broader concept of development. The Bank’s mission as currently defined consists of the alleviation of poverty through economic growth and social equity – all of which have important human rights dimensions.

Social equity is a rich and complex notion. As Nobel Laureate, Amartya Sen has argued, we must view development in terms of freedom and the removal of obstacles to it, including poverty, tyranny, poor economic
opportunities, systemic social deprivation, the neglect of public facilities as well as intolerance.\textsuperscript{6}

Social equity thus includes fighting poverty and inequality, giving the poor and marginalized a voice, i.e., empowerment; freedom from hunger and fear, as well as access to justice. \textbf{Social equity has, therefore, an obvious human rights component.}

It is clear that under President Wolfensohn the practice of the Bank is moving towards a conception of development, and of its mandate, that is more grounded in equity and the social face of development.

Let me turn now to the issue of economic considerations.
B. ECONOMIC CONSIDERATIONS

The Articles provide that only economic considerations shall be relevant to the decisions of the Bank and its officers, and these must be weighed impartially. What then constitute economic considerations for these purposes?

Let me start by reminding ourselves that the World Bank, although a development institution, is primarily a financial institution. In making decisions about the investment of limited public resources available, the Bank – like its private sector equivalents - needs to weigh up the wisdom of its proposed investments. It must rely upon analysis of all the factors that can affect the investment. And, these must include the “investment climate” in the recipient country. We have already accepted the fact that issues of governance are relevant but, in my view, it goes further than this. Research has shown that lack of respect for human rights norms can seriously affect the economic rate of return or even the viability of investment projects.

Similarly, it has long been recognized in the Bank that political considerations can have direct economic effects. For instance, in making
the judgment of country creditworthiness that the Articles require, the Bank must consider the degree of political stability of the government.\textsuperscript{9}

In my opinion, therefore, it is consistent with the Articles that the decision making processes of the Bank incorporate social, political and any other relevant input which may have an impact on its economic decisions.

This same line of analysis applies to the discussion of which human rights are relevant for the making of economic decisions. Some assert that only economic rights are relevant, not the political ones. In my view there is no stark distinction between economic and political considerations, there is similarly an interconnection among economic, social and cultural rights on the one hand, and political rights on the other. It is generally accepted at the political level that “all human rights are universal, indivisible, interdependent and interrelated.”\textsuperscript{10}

Also from a financial point of view I believe the Bank cannot and should not make a distinction either – it needs to take all these considerations into account. In all cases, however, Bank decision-making must treat these considerations impartially, treating similarly situated countries equally.

C. POLITICAL PROHIBITIONS
The other limitations in the Articles relate to politics. There are two general political prohibitions in the Articles which must also be respected.

First, Bank interference in a country's political affairs is barred. Second, Bank decisions cannot be influenced by the political character of the member country. The ban on political interference requires the Bank to distance itself from partisan politics, from favoring political factions, and from active participation in political life. The prescribed neutrality with respect to political systems keeps the Bank from endorsing or mandating a particular form of government. But neither of these limitations would prevent the Bank from considering political issues that have economic consequences or implications – so long as this is done in a non-partisan, impartial and neutral manner.

As with the prevailing understanding of what can constitute economic considerations, it is clear that the concept of interference in the context of human rights has also evolved.11

In interpreting the meaning of these political prohibitions, we need to recognize that the concepts of sovereignty and interference have also
evolved. \textsuperscript{12} In the modern world, sovereignty is no longer an absolute shield against scrutiny of states respect for international norms. \textsuperscript{13}

International law now recognizes that there are issues which traverse national boundaries. The examples abound: corporate or financial crimes, money laundering, corruption, terrorism, environmental hazards, the work of International Criminal Court, the work of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and, significantly for our discussion, gross violations of human rights. \textsuperscript{14}

The significance of this for the Bank is that, in my opinion, it can and must take into account human rights violations in its process of making economic decisions. Moreover, because of the way international law has evolved with respect to concepts of sovereignty and interference, and the range of issues that are considered to be of global concern, in doing so the Bank will not fall foul of the political prohibitions of the Articles.

Globalization has forced us to broaden the range of issues that are of global concern. As President Wolfensohn noted in his Address to the Board of Governors in Dubai, we face an immense challenge in creating a new global balance.
Human rights lie at the heart of that global challenge.

These, in sum, are my preliminary thoughts on the legal framework applicable to the Bank on this topic. Let’s turn now to the Bank’s practice.

II. THE BANK’S PRACTICE

Operating within the legal framework that I have described it is clear that the work of the Bank as well as our concept of development will continue evolving - reflecting trends and changes in the world at large.

As early as 1973, then President Robert McNamara addressing the Board of Governors on the meaning of development said: “[We] believe that economic progress remains precarious and sterile without corresponding social improvement. Fully human development demands attention to both. We intend, in the Bank to give attention to both.”

Jim Wolfensohn endorsed a similar vision in the Comprehensive Development Framework, in which he emphasized an integral approach and the two dimensions of development “The macroeconomic aspects on
the one side, and the social, structural and human on the other, must be considered together.”

Overall, there has been a marked shift in emphasis from infrastructure lending to human development. Thirty years ago, the Bank had 58% of its portfolio in infrastructure, today it is reduced to 22% while human development and law and institutional reform represent 52% of our total lending.

The evolving practice of the Bank has an important legal dimension for the interpretation of our Articles, since Article 31 of the Vienna Convention on the Law of Treaties regarding the general rule of interpretation makes provision for “[…] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

Another dimension of the evolving mandate of the Bank is embodied in the world community’s commitment towards realizing the Millennium Development Goals. The Bank has joined other global partners to pledge the attainment of major targets. The Millennium Development Goals, as I am sure many of you are aware, relate to the eradication of extreme hunger, the achievement of universal education, the promotion of gender equality, reduction of child mortality, improving maternal health, combating
HIV/AIDS, ensuring environmental stability and developing a global partnership for development.

The Bank’s work contributes to the realization of all eight MDGs, and all eight MDGs involve more than one human right. One concept that the Bank has taken a leading role in developing is Governance. Our deepened understanding of how to achieve development effectiveness has lead us to consider governance. The importance of effective governance is now well appreciated and the Bank now finances a range of activities in support of governance. Governance itself has a strong human rights content, indeed, this is an area in which our research has found a rich set of connections in charting the work of the Bank to key international human rights provisions. Governance incorporates transparency, accountability, and a predictable legal framework.

All of these principles are clearly linked to the “rule of law” with its inherent notions of fairness and social justice. The “rule of law” itself includes access to justice, recognition before the law, and the independence of the judiciary all of which are protected under international human rights law. However, the rule of law must also be supported by a number of other indispensable factors such as public participation a free press and a voice for civil society. These too relate to important provisions of a
number of international human rights instruments, particularly those of the International Covenant on Civil and Political Rights.²¹

So, while governance is a crucial concept, my view is that governance does not go far enough: we must go beyond it to look at the issues of social equity alongside economic growth. Here legal and judicial reform programmes have a key role to play if they support the development of such concepts within national legal systems.²² Social equity programmes should, to my mind, be seen as falling squarely within the mandate of the Bank. Our legal and judicial reform projects already advance social equity. The Bank supports a wide array of Legal and Judicial Reform initiatives: there are approximately 600 Bank-financed projects related to legal and judicial reform and to date there are 16 active “free-standing” projects in 4 regions. For example, in the Sri Lanka Legal Aid Services to Poor Women project, training on gender sensitivity in handling cases is provided to judges and court personnel, as well as training on existing national laws and international treaties, and in the Bangladesh Judicial and Legal Capacity Building Project, improved access to justice is a key project objective.²³

III. THE WAY FORWARD
So, let me conclude with some preliminary pointers for the way forward.

I believe that a realistic assessment of the work of the Bank leads inevitably to the conclusion that it has made a substantial positive contribution to human rights, and that it will increasingly continue to do so. In particular it has fulfilled and will continue to fulfill an important role in assisting its Members progressively realize their human rights commitments. However, there are limits that must be respected.

There are legal limits. We need to interpret them in a way that is consistent with the purpose of the Bank, in a dynamic way and in a modern context, but the limits do exist. We must work within the legal framework that I have described today to tackle the challenges presented by human rights issues as they evolve.

And there are also institutional limits. The Bank is a specialized financial agency. We cannot lose sight of the specificity of our function as a financial institution in the development context. We also have finite capacity and limited resources. For now at least, I believe we should embrace the centrality of human rights to our work instead of being divided by the semantics of adopting a “rights-based approach”
Within both these constraints there is still a great deal of latitude. Insofar as human rights constitute a valid consideration for the investment process they are properly within the scope of issues which the World Bank must consider when it makes its economic decisions.

And this consideration must include all human rights: those classified as economic, social and cultural, as well as those classified as civil and political. Moreover it stands to reason that we must address the potential economic consequences of human rights situations, and consider the risks ex ante, not only ex post facto.

However, as a development institution we must also ensure that we work in a manner that does not inflict a “double punishment” on the people of our client countries by turning our backs on them because of the human rights record of their governments. It is easier for a company to walk away from a particular investment than for the Bank to walk away from a whole country and thus inflict additional hardship on those who may already be suffering governmental abuse.

The Bank’s role is not that of enforcer. Enforcement belongs primarily to the mandate of the member countries, and other, non-financial entities. Our role is a collaborative one in the implementation of our member countries human rights obligations.
We do need to work within countries to exert a **positive influence**, to deepen the dialogue and to share our knowledge and expertise. And in this venture we need to accept that we must work with countries that do not respect human rights as well as those that do.

So, how does the Bank move forward in this area?

The way forward in the area of human rights and development must be consistent with the mission of the Bank, that is to say, poverty alleviation through economic growth and social equity. The human rights content of this direction is beyond question.

As we move in this direction there is a clear and unmet demand from our member countries for legal and judicial reform programmes. We certainly need to dramatically scale up our interventions in this field with a wide range of partners. Through these programmes, as well as through every other aspect of the Bank’s work, many of the human rights aspirations can be progressively realized.

I can assure you that during my tenure my office will be fully committed to our institutional mission of poverty alleviation through economic growth
and social equity. And, given that the rule of law is an indispensable component of these goals, we will strongly support legal and judicial reform, aiming for the progressive realization of human rights everywhere in the world.

1 Agreement concluded with the United Nations in 1947, 16 UNTS 346.

2 In his Legal Opinion on “The Prohibition of Political Activities in the Bank’s Work” (July 11, 1995), Ibrahim Shihata concluded “In fact, the Bank’s work has promoted a broad array of economic, social and cultural human rights. Its proclaimed overriding objective at present is to enable its borrowing countries to enjoy freedom from poverty, a basic freedom which many find to be required for the full enjoyment of human rights. The Bank increasingly contributes to the borrowing countries’ efforts to develop their human resources, through its lending for education, health and nutrition, and to strengthen their systems of governance, through its lending for legal, regulatory, judicial and civil service reform. It encourages the involvement of affected peoples and local NGOs in the design and implementation of the projects it finances. It encourages the involvement of affected peoples and local NGOs in the design and implementation of the projects it finances. It, and the Global Environment Facility of which it is the trustee and the main implementing agency, currently represent the multilateral organization with the greatest involvement in the protection of the human environment. It has also integrated the promotion of the role of women in development in its operations. It tries to ensure, through its pioneering directives, humane conditions for the resettlement and rehabilitation of the people affected by the projects it finances and protection for the rights and distinctive cultures of indigenous peoples. More broadly, it advocates through its lending operations and policy advice the liberalization of investment and the free flow of services, goods and information. Clearly, these activities have a direct effect on the amelioration of non-political human rights. They may even pave the way for greater awareness and protection of political rights in the borrowing countries.” (at page 26)

3 Article III, Section 5 “b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”

4 Article IV, Section 10. Political Activity Prohibited
“The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic
considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”

There is one further limitation that applies specifically to Bank lending—the requirement that funds be used for the purposes intended and “without regard to political or other non-economic influences or considerations.” (Article III, Section 5). This limitation, coupled with the need for economy and efficiency, strengthens the economic and technical character of Bank operations. It can be considered a protection against corruption and misuse of funds.

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7 See I.F.I. Shihata, Issues of “Governance” in Borrowing Members: The Extent of their Relevance under the Bank’s Articles of Agreement. Memorandum of the Vice President and General Counsel December 21, 1990

“i) The degree of political instability of the government of a member requesting a loan and of the security of its territories could be such as to affect the development prospects of the country including its prospective creditworthiness. Political changes may also affect the borrower's ability to keep its commitments under a loan agreement or the ability of the Bank to supervise project implementation or to evaluate the project after its completion.

As a result, partial or full foreign occupation of the country's territories or civil strife in such territories cannot be deemed irrelevant to the Bank's work simply because they are of a political nature. Bank lending in such circumstances may run counter to the financial prudence required by the Bank's Articles (Article III, Section 4(v)). It may also threaten the standing of the Bank in financial markets or otherwise adversely affect its reputation as a financial institution. Indeed, the Bank has long recognized that it "cannot ignore conditions of obvious internal political instability or uncertainty which may directly affect the economic prospects of a borrower." 74 This position has been consistently upheld by the Bank's Legal Department, most recently in the Legal Memorandum of December 23, 1987. 75 It is important to recall, however, that in such situations the Bank would still be taking into account relevant economic considerations; political events would represent only the historical origins or the causes which gave rise to such considerations.”


9 Article III, Section 4 Conditions on which the Bank may Guarantee or Make Loans provides
“(v) In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in a position to meet its obligations under the loan; and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.”

10 United Nations World Conference on Human Rights (Vienna 14-25 June 1993) issued the Vienna Declaration and Programme of Action (A/CONF.157/23) 12 July 1993, Section 5 of which provides: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

11 “Unlike many components of classical international law, the human rights movement was not meant to work out matters of reciprocal convenience among states […] Rather it reached broad areas of everyday life within states that are vital to the internal rather than international distribution of political power. As international law’s aspirations grew, as the law became more critical of and hence more distanced from state’ behavior, the potential for conflict between human rights advocates within a state and that state’s controlling elites escalated.” H. Steiner, “The Youth of Rights” 104 Harvard Law Review 917 (1991) at 929.

12 “At its very threshold and to this day, the human rights movement has inevitably confronted antagonistic claims based on conceptions of sovereignty. How could its premises coexist with the then reigning concepts of state sovereignty? Or have the nature of the state, and the concept of that protean concept as well as of allied concepts like domestic jurisdiction and autonomy, themselves undergone substantial change over the half century of this movement?” H.J. Steiner and P. Alston, International Human Rights: Law, Politics and Morals (2ed.) 573. See also. Proceedings of the Eighty Eighth Annual Meeting of the American Society of International Law (1994) The Transformation of Sovereignty; Louis Goodman, “Democracy, Sovereignty and Intervention” in 9(1) Am. U. J of Int’l Law and Policy (1993) 27

13 It is worth noting that the U.N. Charter, adopted in 1945, balances the principles of sovereignty and non-interference with that of respect for human rights:

“Article 2(1) The Organization is based on the principle of the sovereign equality of all its Members”

“Article 2(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”
(Prior to the U.N. Charter, Article 15(8) of the Covenant of the League of Nations prohibited the League from interfering in the member country’s “domestic jurisdiction.”)

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The Preamble “reaffirm[s] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, […]”

Article 1 enumerates the purposes of the United Nations, including “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

Further, Article 55 provides:
“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

14 A different, though related issue is that of universal jurisdiction for war crimes, genocide or crimes against humanity.

15 R. McNamara, Address to the meeting of the Board of Governors Copenhagen, Denmark September 21, 1970 as quoted in E Mason & R Asher, The World Bank Since Bretton Woods (1973) at 475.


“General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

18 Indeed, each MDG can be traced to the furtherance of one or several core human rights. For instance, MDG #2 embodies a commitment to achieve universal primary education. This is a right provided for in Article 26 of the Universal Declaration on Human Rights (G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)); and Articles 6, 10; 13; and 14 of the ICESCR (993 U.N.T.S. 3, which entered into force Jan. 3, 1976). In the ICCPR (999 U.N.T.S. 171, which entered into force Mar. 23, 1976), the right to education is provided for in Article 18 and Article 19.


20 The right to be recognized as a person before the law is provided for in Article 6 of the Universal Declaration on Human Rights, and in Articles 2, 9, 14, 16 of the International Covenant on Civil and Political Rights (hereafter ICCPR). The right to an effective remedy by a competent national tribunal is provided for in Article 8 of the UDHR and in Articles 2, 14 of the ICCPR. The right to a fair and public hearing by an independent and impartial tribunal in the determination of one’s rights is provided for in Article 10 of UDHR. The right to be presumed innocent unless proved guilty according to law in a public trial is provided for in Article 11 of the UDHR, and in Articles 14 and 15 of the ICCPR.

21 For instance, freedom of thought, conscience and religion are provided for in Article 18 of the UDHR; Article 10 of the ICESCR and Article 18 of the ICCPR. The right to freedom of opinion and expression; the right to hold opinions without interference and the right to receive and impart information and ideas through
any media and regardless of frontiers are provided for in Article 19 of the UDHR, and Article 19 of the ICCPR.


23 Additionally, in Ecuador, one of the Judicial Reform Project’s focus was court reform, which included judicial training as one of its components along with case administration, information support and infrastructure. Some of the training specifically focused on human rights as it relates to women’s rights in Ecuador. In Georgia, the Judicial Reform Program is implementing training for the judiciary as part of its objective to develop an independent and professional judiciary. Other projects include judicial training to support the judicial sector generally, such as in Argentina, under the Model Court Project, where training supports improved case management. See generally, World Bank *Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency* (2002) and *Legal and Judicial Reform: Strategic Directions* (2003)