MEETING OF THE STATES PARTIES TO
THE CONVENTION ON THE PROHIBITION
OF THE DEVELOPMENT, PRODUCTION
AND STOCKPILING OF
BACTERIOLOGICAL (BIOLOGICAL) AND
TOXIN WEAPONS AND ON THEIR
DESTRUCTION

BWC/MSP/2005/MX/WP.6
9 June 2005

ENGLISH ONLY

Third Meeting
Geneva, 5-9 December 2005

Meeting of Experts
Geneva, 13-24 June 2005
Item 5 of the provisional agenda
Consideration of the content, promulgation, and
adoption of codes of conduct for scientists

THOUGHTS ON THE FUNCTIONS OF CODES OF CONDUCT: POTENTIAL WEAKNESSES AND SOLUTIONS

Prepared by Canada

Introduction

1.   As a part of the mandate received from the Biological and Toxic Weapons Convention (BTWC) 5th Review Conference, the intersessional meetings of the BTWC have been tasked with examining a variety of topics related to the functioning of the treaty. In 2003, the topics discussed, namely "the adoption of necessary national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation"; and "national mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins", were relatively straightforward in that they reflected obligations set out in the Convention. The topics for 2004, "enhancing international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease"; and "strengthening and broadening national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combatting of infectious diseases affecting humans, animals, and plants", reflected issues of wide concern encompassing not only the BTWC but also elements of public health and agricultural concerns. As was evident from the presentations given by the World Health Organization (WHO), the Food and Agriculture Organization (FAO), and the Organisation mondiale de la santé animale (OIE), similar concerns have also been addressed by several eminent international organizations.

2.   The topic for 2005, "the content, promulgation, and adoption of codes of conduct for scientists" is especially interesting as it addresses a topic that is at the heart of the BTWC and yet also highlights some of its institutional weaknesses in the wake of the failures of 2001. Codes of Conduct, Practice or Ethics, unless backed up by legislative authority or some other form of

GE.05-61714

sanction, are by their very nature voluntary and rely upon the positive inclinations of those affected by the code to follow their provisions. Unfortunately, human nature being what it is, plans that are laid with the best of intentions often lead nowhere, or to unexpected and undesired ends. In order to avoid this fate, it is often wise to be aware of potential pitfalls and to devise means for avoiding or surmounting them. This paper will briefly examine some of the potential weaknesses of codes of conduct and suggest ways in which States Parties may be able overcome these problems. In addition this paper will also note the realm in which codes can function most effectively and be of maximal value.

Weaknesses of Codes

Replacement for Legislation

3.   Codes of conduct or practice can serve to give significant guidance to researchers or academics with regard to what they can and cannot do. Given the difficulty that can sometimes surround the process of enacting comprehensive legislation and regulations, and the resentment that this can often cause when it is seen as being imposed upon the scientific or commercial sectors, there may be a temptation to allow such sectors to self regulate and be free of governmental intervention. This argument is made all the more persuasive by the fact that these sectors often possess greater knowledge about their areas of expertise than would a government; that the commercial sector is driven by market forces that would prevent companies from entering into counter-productive ventures; and the idea that scientists are inherently honest and know themselves what is best for their profession. While self regulation and codes of conduct can definitely play a strong supporting role for legislation, they are not substitutes for laws that prohibit and regulate certain types of activities and behaviours.

4.   At a fundamental level, the mandate of a government is such that it has to take into account all aspects of a given jurisdiction and attempt to balance the needs of different, often conflicting, segments of society. Corporations or academic bodies, which are much more focussed, do not possess, nor have a particular interest in, this wider mandate. As such, only government has the legitimate authority to legislate and enforce actions or behaviours on its territory. For this reason, Article IV of the BTWC specifically obliges States Parties to enact national measures as follows:

> *"Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere."*

5.   In order to ensure compliance "necessary measures" must be backed up by enforceable legislation, not simply a code of conduct.

Legislative Overload

6.   Related to the above, a problem relating to codes of conduct can often be that they will be disregarded due to an overload of government imposed rules and regulations. The primary

responsibility of a researcher is to research, but in a society with complex and evolving legislation, it is also incumbent upon such professionals to stay abreast of new regulations and ensure that they are in compliance. This is done not primarily to ensure that they do not run afoul of the law, which could result in sanctions or a cessation of the research program. Unfortunately, the time spent in following these formal regulations, which cuts into the time researchers can devote to their science, may result in a reduced willingness to abide by non-enforceable codes of conduct. In the end, researchers, like all other professionals, have to prioritize their time, and give precedence to those elements that have maximal impact and benefit on their life and work.

7.   There are several ways that this particular issue can be tackled. One extreme method would be for government to simply legislate all the provisions in a given code of conduct, but this would rather defeat the purpose of the code in of itself. Another method is to have a non-governmental body that has the power to sanction those who violate the code, without involving actual legislation. An excellent example of this is found in the legal profession, where a lawyer can be "disbarred" due to unethical behaviour. This disbarment, while not a legislative penalty, nevertheless strips away one's career prospects, preventing them from working in their chosen field in their particular jurisdiction. This can be further expanded if the professional bodies in various jurisdictions exchange information amongst each other, resulting in a larger "blackout" area for the disbarred individual. Another tool is to make funding of particular projects contingent upon ethical behaviour. A violation of the code of conduct results in a reduction or elimination of funding. This also has the effect of ensuring that researchers working on a joint project will be vigilant not only with regards to their own professional behaviour, but also that of their colleagues.

8.   The aforementioned efforts rely primarily on "sticks in the form of criminal, professional or financial sanctions. A further method incorporating a more "carrot"-like approach is to structure a code of conduct in such a way that the individuals affected by it will wish to follow its provisions. This would involve the provisions having a direct benefit to the affected individual's professional life, and could include aspects such as streamlined practices or the promise of greater collaboration within a professional association. With any type of code however, outreach and education will be essential to ensure that it is understood and, to the degree possible, followed.

Creating False Expectations

9.   False or unrealistic expectations can damn the best of ideas. The creation of code of conduct that will make for a safer, happier, more productive work environment is a lofty goal, but one that will be doomed to failure if the code is ignored. Worse still, dashed expectations may lead to increased cynicism and an unwillingness to undertake any positive initiatives that are not comprehensively legislated and fully enforced. In addition, an ambitious code of conduct can be derailed by individuals who decide that they do not wish to follow its provisions, with no perceptible consequences to them. This is a key problem with virtually all codes of conduct that lack the power of applying sanctions to violators. Even a code that may have the backing of a financial, professional or legislative sanction may succumb to the pitfalls of disillusionment if not properly constructed.

10.   Codes of conduct are at their best if they set realistic and obtainable goals that do not overly distract from the day-to-day business of a laboratory or similar institution. The codes should also be set up such that they do not make promises that will be impossible to keep. A code of conduct should guide and inspire individuals to do the best job possible, with exemplary professionalism and in a responsible manner. Codes attempting to do significantly more than this without having clear and obtainable goals are likely ripe for failure.

Chilling Effect

11.   In the post 9/11 world, security concerns have become paramount. To this end, many governments (including Canada) have been busy drafting new legislation and regulations that have aimed to increase security and ensure proper screening of individuals working with potentially dangerous substances. While these measures are very important, they can have the unintended side effect of creating a chill in research institutions, thus diminishing the quantity and quality of cooperation (both domestically and internationally) between such centres. More significantly, this cooling effect can also cause individuals to elect to abandon otherwise promising avenues of research, or even more dangerously set up shop in other, poorly regulated environments. Codes of conduct can inadvertently add to this effect, making individuals ever more wary of disclosing information thus impinging upon the necessary sharing of ideas and research. In addition, while the best codes ideally strive to create a collaborative environment, provisions for "whistle blowing" can also mean that colleagues become cautious around one another, heightening suspicion and further cooling the cooperative instinct.

12.   This problem runs much deeper than codes or regulations, and represents a shift in the perception of personal and professional security and safety. While some previous security lacunae have been filled thanks to this new vigilance, there has to be care taken to avoid creating a climate of paranoia amongst researchers. Codes, if properly designed, can not only avoid adding to the problem, but can actually help to alleviate it. Encouragement of collaboration and a general strengthening of comradery will help to develop a sense of openness. A sharing of information and transparency regarding personal work, as well as the larger organizational goals, will also permit colleagues to better understand and appreciate each other's projects, creating an atmosphere of trust. Codes can further encourage this cooperation beyond the immediate institution, while still ensuring that proper safety and security measures are maintained. While it is important to create an atmosphere whereby those who see a possible conflict of interest or questionable activity can come forward without fear of retribution, at the same time it is important to put in safeguards to ensure that personal vendettas and "witch-hunts" do not consume an organization. While a code or regulation can reward due vigilance, it should also aim to sanction frivolous complaints. Such an atmosphere of openness, if properly created and maintained, can serve as a strong incentive to following a code of conduct.

Negative Economic Pressure

13.   Knowledge, and the skill sets needed to bring it forth, are extremely valuable commodities in the global marketplace of ideas. Like so much else in this era of globalization, knowledge, skills and the people who possess them can move very easily and quickly from one place to another. Also like other goods and services, the "value" of particular types of knowledge and skills responds to market pressures. A plethora of individuals with a certain skill

will cause the value of that skill to be reduced, which may lead to reduced wages or even redundancy for certain individuals. On the other hand, a scarcity of a certain skill that is in demand will generate upward economic pressures, allowing that individual to command top dollar from a potential employer or customer. In some cases, a scarcity of a skill may not result from a lack of individuals who possess the knowledge required, but rather the unwillingness of those individuals to engage in a certain type of work. A code of conduct could contribute to this situation in the following way: In a situation where a valuable, but perhaps dubious, activity "XYZ" can be undertaken by only 10 people who actually possess the required knowledge, all of their skills will be highly prized and will command a high price. If a code is later developed which forbids "XYZ", and all 10 agree to sign and abide by the code, this will, in the short term at least, eliminate the "supply" but it is unlikely to do the same for the "demand". Following the logic of market forces, there will be an inevitable upswing in the value of the skills in demand, such that at some point one or more of the individuals may see the benefits of acting as a highly valued "supplier" outweighing their commitment to the code and their previous uncertainties about working on activity "XYZ".

14.   While most individuals will abide by an agreed upon code, this negative economic pressure can act as a powerful disincentive to abandon this commitment. While there is no easy way to directly counter these market forces, education and vigilance to the ideal of the code will help ensure its durability. In some cases, backing a code up with the threat of a sanction (as discussed above) will help to counter this economic pressure. Similarly, if an institution notes that an individual is being tempted by this sort of economic incentive, it can attempt to ensure that he is adequately compensated for his work, and that the benefits of continuing to undertake legitimate activities outweighs the perceived "greater benefits", and associated risks, of engaging in more dubious work. In this sense, codes, like legislation, have to be treated as living documents with the flexibility to respond to changing circumstances as required.

Whose Ethics?

15.   Often codes are based on designated good practices or ethical behaviour. The problem that arises here is the question of whose "good practices" or ethics are being used in the code, and whether these necessarily universal. Common-sense ethical behaviour as defined by a 30 year old woman from North America may be quite different from that of a 60 year old man in North Africa. Ethics are very often dependant upon cultural and societal contexts, without a one-size fits all approach. This issue can be particularly tricky in multicultural societies or in institutions with individuals from many different countries. This also raises difficulties in defining behaviour even within the same societal context. As an example, was the use of poison gas by both sides in World War I ethically wrong (as it would be argued today), or would it have been worse to forgo this weapon and thus give a significant tactical advantage to the enemy, thus risking the overall defence of the territory. Alternatively, using an economic argument, is it ethically better (on a personal level) to allow one's family to go hungry rather than engage in work on a dubious project. Finally, codes of practice, while seen as more universally applicable, may also be subject to circumstances. Allowing for basic levels of security and safety, is there necessarily one "best practice" that trumps all others? Even if a certain practice can be shown to be superior, one has to balance the costs of preparing to implement the new procedures, and the inevitable disruption this will cause people used to older systems, against the efficiencies gained by utilizing the new approach. A code that only recognizes one type of best practice, while

helping to streamline certain procedures, may actually hinder the wider goals of cooperation and research.

16.   Designing codes that address these issues is a challenge. It is not unreasonable to have a code that acknowledges the shared values of a community, but this code should be flexible enough to be able to accept, and be accepted by, others who may not share those same values. A code should not be so open, however, as to allow any decision, regardless of how reprehensible, to be seen ethical and morally equivalent. If a community does have agreed upon shared values (ie: the production of biological weapons is prohibited) then all members must be expected to adhere to this idea, regardless of possible counter-arguments. This does not mean, however, that a code must be cast in stone, forever unchanging. Codes, as is the case with legislation, must adapt to realities, but they should always endeavour to take the highest moral road possible. With regards to best practices, there are naturally certain basic requirements that an organization can insist upon meeting, and said group would have every right to resist arrangements with those who might jeopardize their standards. However, there may be several ways to get to the same point, all of which are equally safe and valid. Codes should possess provisions that allow for the flexibility to adapt to these alternatives as required.

Conclusions

17.   This paper has not attempted to offer any specific technical suggestions for implementing codes of either a general or specific nature. This will be left to other Canadian papers looking at specific codes created in Canada dealing with the governmental, academic and professional situations. Rather, this paper has tried to point out some of the various pitfalls that may befall a code of conduct and suggest ways of avoiding or mitigating them. Canada's codes do not address all of these issues all the time, but many have elements that look to solve some of these problems before they arise. In the end, the most important tool in designing and following a code of conduct is common sense, and an understanding that these documents are tools that should continue to evolve and improve. The limitations of codes must also be understood. They are not substitutes for legislation, and nor are they panaceas for all the potential problems of an organization. Ultimately, a code of conduct is meant to improve a set of procedures or a work environment. The creation of a rigid document that fails to address the issues discussed above risks not only failure in its primary purpose, but can cause all sorts of problems in of itself.

_____