



NAPPO

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Organización Norteamericana de Protección a las Plantas

MEXICO - USA - CANADA

DD 07: Diversion from Intended Use

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Diversion from Intended Use (DFIU)

Introduction

This paper developed by the NAPPO Expert Group on Diversion from Intended Use:

- describes what diversion from intended use *is* and *why* it is an issue in trade,
- explains why harmonized guidance is needed,
- describes elements that could be considered in a regional standard, and
- suggests possible courses of action NAPPO may wish to consider.

1. What is Diversion from Intended Use?

Many commodities have multiple intended uses with different risk profiles. The intended use indicated for a commodity may be processing, ornamental, propagation or consumption; however, this might change. Diversion from intended use occurs when regulated articles are used for *other than their originally declared purpose* after importation. Unintended uses of a commodity may result in a higher probability of pest establishment and spread than the declared intended use, with possible negative economic consequences and even resulting in the closure of international markets.

Some commodities may be susceptible to diversion from intended use, for example:

- Potato tubers intended for direct human consumption may be used as vegetative seed potatoes;
- Bulbs/corms/tubers (for example, garlic, onion and taro) imported for consumption may be planted for propagation;
- Fresh fruits and vegetables imported for direct consumption may be used as the source of seeds for propagation (for example, fresh avocado, pepper, tomato);
- Grain or seeds, not for planting, and intended for industrial processing, may be used as seed for planting;
- Ornamental cut flowers intended for time-limited decorative purposes may be propagated;
- Seed intended for destructive laboratory testing may be used for planting;
- Wood chips intended as fuel may be used in landscaping.

The following scenarios demonstrate how DFIU is problematic in international trade. Scenario 1 focuses primarily on the impacts to exporting countries. Scenario 2 demonstrates how the exporting and the importing countries can be affected by DFIU. Scenario 3 focuses primarily on the impacts to importing countries.

Scenario 1: DFIU is problematic for the exporting country

Country X would like to export corn for consumption to Country Y. Country Y indicates that the corn must be free of regulated Pest A (corn for consumption is a pathway for this pest). Country Y also requires pest freedom for another pest, Pest B (corn would be a pathway for Pest B only if it were diverted to planting).

Country X requests technical justification from Country Y. Country Y provides a copy of its pest risk analysis (PRA) for corn for consumption which identifies Pest A. The PRA does not identify or analyze Pest B. However, Country Y indicates that since some corn intended for consumption *MAY* be planted by farmers, it is also requiring measures for Pest B.

Why does this Scenario present a problem? In Scenario 1, measures for Pest A are technically justified by the PRA which considers the intended use (consumption), as recommended in ISPM 11, Annex 4.

However, measures for Pest B (up to and including closure of the border) are not technically justified by the PRA because the PRA is for corn for consumption and does not consider the deviation of intended or unintended use (planting). As such, Country Y is imposing phytosanitary measures for Pest B without an assessment of the likelihood and magnitude of risks of diverted corn, or the consequences of this diversion.

If there were harmonized guidance on risk assessment for DFIU, the importing country (Country Y) would be able to consider the likelihood and consequences of DFIU for Pest B in its PRA and would have been able to impose technically justified measures to mitigate the risk from diversion on Pest B.

Scenario 2: DFIU is problematic for both exporting and importing countries

Country X regularly exports to Country Y a commodity (fresh fruit). The end use of this commodity is human consumption in Country Y. Phytosanitary requirements for the consumption end use are well established because a PRA was done, which identified Pests 1, 2 and 3.

As an emergency measure, Country Y closes the market because the commodity (fresh fruit) was diverted to planting in Country Y. Country X requests a justification for this measure and reopening of the market, but this is not possible because Country Y indicates that the commodity (fresh fruit) must be free of regulated pests other than those identified in the PRA for the intended use.

Why does this Scenario present a problem? There are at least 2 issues involved in this Scenario:

- **Issue 1: Need to justify temporary emergency measures by PRA** - Country Y (the importing country) may adopt temporary emergency measures when a new or unexpected risk is identified; however according to ISPM 1 (Section 2.11 - emergency measures) these measures must be justified by a PRA as soon as possible in order for measures to remain in place.
- **Issue 2: How to evaluate emergency measures by PRA?** - But how will Country Y do this? Country Y has already done a PRA (PRA 1) for the intended use of this commodity (consumption) which does not fully capture the risk to Country Y if, in fact, DFIU takes place. However, if Country Y does a second PRA (PRA 2) that considers only the risk from the unintended use (planting), the risk to Country Y will be overestimated because not all of the fresh fruit consignment is being planted. Neither PRA (PRA 1 or PRA 2) accurately estimates the risk to Country Y or provides a technical justification for continued emergency measures. This example reinforces the need for harmonized guidance on how to analyze the risk from both intended and unintended uses when DFIU is likely to occur.

Scenario 3: DFIU is problematic for the importing country

Country Y (the importing country) detects a new soil-borne Pathogen A in a locally grown crop. Investigation into the situation reveals that the source of the Pathogen A is potatoes imported for consumption that have been planted in a small field. Country Y (the importing country) had not assessed the risk of DFIU or imposed import measures to prevent this possible diversion. Country Y also lacks knowledge or capacity to impose measures to deter DFIU in their country. Now their local crops could be at risk due to this new Pathogen A.

Why does this Scenario present a problem? Again, without harmonized guidance on how to incorporate DFIU into the PRA, the importing country is left vulnerable to the risks associated with DFIU and the challenges of implementing measures to deter or mitigate against DFIU once the commodity is imported.

Both importing and exporting countries can suffer when measures do not accurately reflect the risk from DFIU. In Scenario 3, the importing country suffers because measures were too lax and did not accurately reflect the risk from DFIU. Measures to prevent DFIU in the importing country can be effective, especially

when used in combination with technically justified measures imposed at the border or before importation. Guidelines for assessing the risk from DFIU and guidelines for managing the risk from DFIU can benefit both importing and exporting countries.

2. Managing the Risk of Diversion from Intended Use

Situations similar to the three scenarios indicated above occur frequently in trade of commodities with multiple end uses that have differing risk profiles. DFIU presents problems for both importing and exporting countries because when there is no rational relationship between the declared intended use, the assessed risk and the strength of measures, there is a danger of either over-regulating (measures are too strict and are not technically justified) or under-regulating (measures are not strict enough to protect the importing country).

Over-regulating is likely to be problematic for exporting countries. Under-regulating is problematic for importing countries. The risk associated with diversion from the declared purpose of import may be real, but, should entire consignments of these commodities be regulated based on their highest risk use, and not their intended use, without technical justification, simply because the possibility of diversion exists? In cases where a commodity may have multiple end uses and DFIU is likely to occur, risk analysts may want to consider expanding the analysis to consider uses in addition to the declared intended use. But how can this be done? Without harmonized guidance, countries may resort to *ad hoc* methods to assess risk from DFIU which may not be understood or accepted by their trading partners.

3. Stricter Phytosanitary Regulations

The risk of DFIU may be managed by imposing more stringent phytosanitary regulations to account for the possibility of diversion. However, when this is done, it should be clear that any measures imposed to manage the risk of diversion must be derived from the evidence based on assessed risk. This currently presents a challenge to importing countries because assessing the risk of DFIU is complex and there is no established harmonized guidance.

Some of the important issues for which harmonized guidance is needed include:

- How to assess the likelihood, magnitude, and consequences of DFIU;
- How to explicitly consider the uncertainty associated with DFIU;
- How to consider the assessed risk from both intended and unintended pathways when imposing measures;
- Clarification that any measures to manage DFIU must be based on documented and supported evidence and on assessed risk.

4. Risk Management Measures

An importing country may set phytosanitary measures for DFIU as long as there is technically justified evidence to support the application of measures, which must be borne out by the appropriate PRA. For this purpose, the commodity to be imported must be fully characterized to clearly specify the plant organ or part and the intended use once it has entered the country. Therefore, each country's National Plant Protection Organization (NPPO) could consider issuing within their territories the corresponding regulations to avoid DFIU of a proposed commodity.

Should both the exporting and the importing countries agree, the risk of DFIU may be managed by measures taken pre-entry, at entry, post-entry, or a combination. Prohibition should be applied only when no other alternative measure is available since it is the most restrictive risk management option.

Measures taken in the exporting country (**pre-entry**) can prevent commodities targeted for commercial trade and for which consumption is the intended use from being successfully propagated in the importing country. For example:

- Seed or grain may be devitalized through physical, chemical or biological procedures;
- Sprout inhibitor may be used on bulbs/corns/tubers to prevent germination as long as the effectiveness of sprout inhibitors has been evaluated by the competent authority of each country and permission given for use on the plant product.

Measures taken **at entry** or in the importing country can be applied to restrict the uses of an imported consignment. Legal or contractual obligations on the importer may ensure that the commodity imported or to be imported is used according to declared intended use at the time of issuance of the Phytosanitary Certificate. Measures taken at entry may include:

- Import authorization in accordance to the corresponding section of the Phytosanitary Certificate and the official inspection at the importing country's point of entry, which must be consistent with the matching documentation and presentation of the product at time of inspection;
- Compliance agreements with importers. Compliance agreements place the burden of preventing DFIU (after a commodity has entered the importing country) on the importer. For example, the NPPO of the importing country may require an importer to move a consignment from the port of arrival to the place of processing/consumption in sealed containers to prevent spillage or diversion;
- Labelling the consignments per unit of the product;
- Increased inspections or testing where a potential for diversion exists;
- Guidelines to safeguard the intended use which focus on custody, responsibility, and traceability of a consignment from point of entry to the declared final destination in the importing country;
- Plant quarantine applied to a consignment.

Additionally, some non-phytosanitary regulatory requirements may safeguard the intended use of a commodity; for example:

- International Union for the Protection of New Varieties of Plants (UPOV) - Some varieties of plants are protected by breeder's rights, which means that the holder of the right has exclusive rights over the sale and production for sale of propagating material of the protected variety;
- Customs Duties - Use of commodities for unintended purposes may be prohibited because customs duties may vary according to end use.

5. Why is Harmonized Guidance Needed?

Harmonized guidance on DFIU is needed to prevent the imposition of phytosanitary measures for high risk uses on a lower risk intended use of a commodity. While intended use and diversion from intended use are mentioned in the IPPC and in several ISPMs (e.g. ISPM 11, ISPM 32), there is no conceptual guidance that explains to contracting parties how to assess risk, ensure rational relationship between risk and strength of measures, or manage risk in cases of DFIU. The lack of harmonized guidance has resulted in *ad hoc* solutions by trading partners, and in at least one regional trade dispute. In some cases, prohibition may in fact increase illegal importations.

Diversion from intended use affects many high-volume, high-value internationally traded commodities. Management of the risk of DFIU is currently being discussed/considered as an issue in the development of several commodity-specific international plant health standards: e.g., grain, seed, cut flowers. It may be

preferable to develop broad conceptual guidance on managing the risk of DFIU, rather than commodity-by-commodity guidance, to ensure that guidance is comprehensive and consistently applied across different commodity types.

6. Elements that could be considered in a standard

The initial specification proposed for a regional standard on DFIU focused almost exclusively on the need for risk assessment guidance. However, after further discussion and consideration, it became apparent that a broader scope, which also describes risk management options to identify and mitigate risks of diversion from intended use, could be more useful to contracting parties and risk assessors in their NPPOs.

Diversion from intended use could be developed as a separate standard, as an Annex to ISPM 32, and/or as an Annex to ISPM 11. Listed below are some elements that could be included in a standard and/or an Annex on DFIU:

- Review of existing standards;
- Examples of commodities susceptible to diversion from intended use;
- Intentional diversion v. unintentional release;
- Diversion of entire consignments v. partial diversion of consignments;
- Requirement to base phytosanitary measures for diversion on risk assessment;
- Situations where assessment of risk of diversion is warranted and situations where it is not necessary;
- Guidance for conducting risk assessment to support phytosanitary measures for diversion (see discussion above);
- Discussion of risk management options for diversion (see discussion above);
- Effect of non-phytosanitary regulatory requirements on diversion.

7. Recommendations of the Expert Group

The NAPPO Executive Committee is requested to:

- *Agree on* the need for harmonized guidance on diversion from intended use within NAPPO;
- *Consider* whether there is a role for NAPPO in raising awareness on the issue of diversion of intended use among NAPPO member countries;
- *Discuss* whether to prepare the document as a NAPPO regional standard or as an annex/appendix to an existing ISPM.
- *Agree on the preparation of a* specification for a standard on DFIU, *including* advice on elements (eg, risk assessment, risk management).
- The standard should include:
 - guidelines to incorporate the possibility of diversion of intended use into PRAs, including the existence of appropriate data;
 - guidelines for selecting appropriate measures when diversion is an issue;
 - guidelines for safeguarding once the product is in the country.
- *Consider* this document as background for either a regional or an international standard.