*Diversion from Intended Use*

*White Paper for the IPPC Strategic Planning Group (SPG)*

*Prepared by Canada and the United States*

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Introduction

1. During the last call for new topics by the Commission on Phytosanitary Measures, the United States suggested development of a standard on ‘diversion from intended use.’ In November 2013, the Standards Committee (SC) reviewed the submission of topics (2013 Call for topics), and concluded that a standard should not be drafted on the subject at this time. However, since the issue was deemed important the SC suggested it be investigated further, and tasked a small group to prepare a discussion paper for the SC May 2014 meeting. The issue was also discussed at the Commission on Phytosanitary Measures (CPM) in 2014. CPM recommended that ‘diversion from intended use’ be considered further by the Strategic Planning Group (SPG) in October 2014.
2. This paper, jointly developed by the United States and Canada for consideration by the SPG:
3. describes what diversion from intended use is and why it is an issue in trade,
4. explains why harmonized guidance is needed,
5. describes elements that could be considered in a standard,
6. and suggests possible courses of action the SPG may wish to consider.

1. What is Diversion from Intended Use?

1. Many commodities have multiple end uses with different risk profiles. 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. Most, but not all, commodities susceptible to diversion are commodities that can either be consumed or propagated. For example:

* Tablestock potatoes intended for consumption may be used as seed potatoes
* Other vegetable bulbs/corms/tubers (eg. garlic, onion and taro) imported for consumption can be planted for propagation
* Fresh fruit and vegetables imported for direct consumption may be used as the source for seeds for propagation.
* Grain intended for processing may be used as seed
* 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

1. The following example demonstrates why diversion is problematic in international trade.

Scenario:

1. 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 B (corn would be a pathway only if it were diverted to planting).

Country X requests technical justification from Country Y. Country Y provides a copy of its PRA for corn for consumption which identifies Pest A. The PRA does not identify 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 is this scenario problematic?

1. There is no technically justified relationship between assessed risk and strength of measures. 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 are not technically justified by the PRA because the PRA is for grain for consumption and does not consider the unintended use pathway (propagation). Country Y is imposing a measure for Pest B without an assessment of the likelihood and magnitude of diverted grain, or the consequences of diversion. This is not consistent with guidance in the WTO/SPS agreement, or with IPPC principles and standards.

Managing the Risk of Diversion from Intended Use

1. Situations similar to the scenario above occur frequently in trade of commodities with multiple end uses that have differing risk profiles. It is possible that grain for consumption may be intentionally planted by some farmers, cut flowers may be intentionally propagated by some consumers, or seed for destructive laboratory testing may be accidentally released by some researchers. 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?

Stricter Phytosanitary Regulations

1. The risk of diversion from intended use 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 diversion is complex and there is no established harmonized guidance. Some of the important issues for which guidance is needed include:

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

Risk Management Measures

1. The risk of diversion from intended use may be managed by measures taken pre-entry, at entry, post entry, or in combination.
2. Measures taken in the country of origin (pre-entry) can prevent commodities for consumption from being successfully propagated in the importing country For example:

* Seed or grain may be devitalized
* Sprout inhibitor may be used on tablestock potatoes to prevent germination.

1. Measures 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 can ensure that the commodity is used according to declared purpose at import. Measures can include:
* Import authorization
* Compliance agreements with importers
* Integrated measures to mitigate risks (e.g. conversion of the commodity into a lower risk article by milling or other processing, and disposal of risky material during conversion or production)
* Labelling of consignments
* Increased inspections or testing where a potential for diversion exists

1. Additionally some non-phytosanitary regulatory requirements may safeguard the intended use:

* International Union for the Protection of New Varieties of Plants (UPOV)
* Some varieties of plants are protected by breeder’s rights, so 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.

1. Why is Harmonized Guidance Needed?
2. Harmonized guidance on diversion from intended use is needed to prevent the imposition of phytosanitary measures for high risk uses on a lower risk intended use of a product. 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 diversion from intended use. The lack of harmonized guidance has resulted in ad-hoc solutions by trading partners, and in at least one regional trade dispute.
3. Diversion from intended use affects many high-volume, high-value internationally traded commodities. Management of the risk of diversion from intended use is currently being discussed/considered as an issue in the development of several commodity-specific standards: e.g., grain, seed, cut flowers. It may be preferable to develop broad conceptual guidance on managing the risk of diversion, rather than commodity-by-commodity guidance, to ensure that guidance is comprehensive and consistently applied for different commodity types.
4. Elements that could be considered in a standard
5. The initial specification proposed for a standard on diversion focussed almost exclusively on the need for risk assessment guidance. But after further discussion and consideration it became apparent that a broader scope, which describes risk management options to identity and mitigate risks of diversion from intended use, could be very useful for contracting parties.
6. 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 elements that could be included in a standard and/or an Annex on diversion:

* Review of existing standards
* Examples of commodities susceptible to diversion
* 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. 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

1. Guidance requested from SPG
2. The SPG is requested to:

* *Consider* the need for harmonized guidance on diversion from intended use;
* *Provide* advice on elements (eg, risk assessment, risk management) that should be included in a specification for a standard on diversion;
* *Consider* actions that should be taken to address and clarify concerns, and identify next steps.