

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 For the reasons indicated in this report, the Panel has found that:

- (a) There is no evidence that the process of selection and consultation of experts was conducted improperly, that due process in the expert consultation phase of these proceedings was compromised, nor that Australia's procedural rights were in any manner negatively affected in this regard;
- (b) The 16 measures at issue in the current dispute, both as a whole and individually, constitute SPS measures within the meaning of Annex A(1) and are covered by the SPS Agreement;
- (c) Australia's measures at issue regarding fire blight, European canker and ALCM, as well as the requirements identified by New Zealand as "general" measures that are linked to all three pests at issue in the present dispute, are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement and, by implication, these requirements are also inconsistent with Article 2.2 of the SPS Agreement;
- (d) New Zealand has failed to demonstrate that the measures at issue in the current dispute are inconsistent with Article 5.5 of the SPS Agreement and, consequentially, has also failed to demonstrate that these measures are inconsistent with Article 2.3 of the SPS Agreement;
- (e) Australia's measures at issue regarding fire blight, European canker and ALCM, are inconsistent with Article 5.6 of the SPS Agreement; New Zealand has failed to demonstrate, however, that the requirements identified by New Zealand as "general" measures that are linked to all three pests at issue in the present dispute, are inconsistent with Article 5.6 of the SPS Agreement; and,
- (f) New Zealand's claim under Annex C(1)(a) claim and its consequential claim under Article 8 of the SPS Agreement are outside of the Panel's terms of reference in this dispute.

8.2 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that Australia's measures at issue regarding fire blight, European canker and ALCM, as well as the requirements identified by New Zealand as "general" measures that are linked to all three pests at issue in the present dispute, are inconsistent with the SPS Agreement, they have nullified or impaired benefits accruing to New Zealand under the WTO Agreements.

8.3 The Panel recommends that the Dispute Settlement Body request Australia to bring the inconsistent measures as listed above into conformity with its obligations under the SPS Agreement.
