

## **SA has declared its first-ever WTO dispute - what happens next?**

**By Wolfe Braude**

When the European Commission's Standing Committee on Plants, Animals, Food and Feed (ScoPAFF) Committee first discussed new phytosanitary measures for South African citrus, largely at the urging of Spain, in early 2022, the possibility of the measure being approved appeared remote, due to the impracticality of South African compliance mid-season, and the significant damage it would cause to the trade relationship between South Africa and the EU. However, in a last-minute about-turn, the Committee approved the revisions to the existing measures in early May 2022, triggering one of the most significant trade disagreements between the parties in recent times.

Since the introduction of the new measures the citrus industry with the support of Agbiz, and the SA government have worked to escalate the engagement to firstly ministerial, then presidential level. The continuous, significant efforts of industry, DALRRD, dtic, and DIRCO culminated in the matter being placed on the agenda of a meeting between President Ramaphosa and the President of the EU Council, Charles Michel, on 19 July 2022.

The measures however remain in place. Of particular urgency, given the unprecedented nature of the decreed implementation timeline, are 1250 containers loaded with 3.2 million cartons of citrus worth over R600 million (EUR35.4 million) which were already packed and processed in good faith for shipment to the EU when the new measures were rapidly approved. These remain therefore technically non-compliant and remain barred at point of entry from entering the EU market. The potential damage to the industry is substantial. For many farmers, already carrying additional input costs and sharply elevated shipping costs, this blow could drive them out of business. Smaller scale farmers or new entrants to the sector are most at risk.

The two trade partners have literally at best a week to now find a practical resolution to the consignments held hostage by the sudden regulatory change. Negotiations are ongoing. It is hoped that at least 900 containers could fall within acceptable parameters if both parties can reach an agreement, with the remainder addressed through parallel negotiations. The remarkable speed of the regulatory change is evident in that even lemon and grapefruit consignments were refused entry last week, due to confusion at EU ports amongst EU officials. This has at least now been resolved. Broader citrus exports are still vulnerable though, as Spanish industry leaders stated in late July that they will continue working to extend the cold treatment requirement to other citrus fruits such as mandarins and grapefruit, a statement supported by the Spanish Minister of Agriculture, Luis Planas. Minister Planas further stated that Spain would defend the classification of citrus as a "very sensitive product" during the upcoming review of the SADC-EU Economic Partnership Agreement which includes South Africa and its neighbouring states (<https://www.fruitnet.com/eurofruit/new-intercitrus-president-urges-compliance-with-new-cold-treatment-protocol/246844.article>). Spain is coincidentally SA's principal citrus competitor in the EU, and in the lead up to the measures experienced a very bad 2021-22

citrus campaign, with production falling and an estimated 26% drop in gross income; with oranges affected the most, experiencing a 58% income loss of around EUR 361.4 million, followed by mandarins with a EUR 243.6 million loss. Domestic consumption has also fallen by 16%, compared to a five-year average.

The scale of the damage and unwillingness of the EU to reconsider the measures has now led South Africa on 29 July to initiate its first ever dispute settlement case, challenging the measures at the World Trade Organisation ([https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds613\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds613_e.htm)). The Request for Consultations notes the consignments en route to the EU as well.

This request has been initiated by South Africa under the WTO Rules and Procedures Governing the Settlement of Disputes and is meant to allow the parties to discuss the matter and find a satisfactory solution without proceeding further with litigation. If consultations have failed however to resolve the dispute after 60 days, SA as the complainant may request adjudication by a panel.

In its statement South Africa expresses significant concerns as to whether changes to the EU regime are justified, stating that the new requirements are not based on science, lack technical justification, are discriminatory, are more trade-restrictive than necessary, and appear inconsistent with the EU's obligations under the Agreement Establishing the WTO. The legal basis for the complaint lists at least 14 specific inconsistencies, amongst others. The EU has now responded formally, agreeing to commence consultations.

What happens next? Dispute settlement is a key component of the WTO-managed, rules-based global trading order. The system is meant to make this trading system more secure and predictable, and the process is based on clearly-defined rules, with timetables for completion. Countries can settle their dispute themselves at any stage if they wish, e.g. similar to an out-of-court settlement.

Stage 1 envisages consultations lasting up to 60 days. If no agreement can be reached, Stage 2 is triggered, lasting up to 45 days, whereby a panel of experts is set up. The panel has six months to conclude the matter. Panel conclusions are difficult to overturn. The entire process can take up to 15 months if appealed, but in urgent cases, and particularly involving perishable goods, it is expedited, for example, the initial panel timeline becomes three months. If the EU loses the case, it will have to change the offending measures or enter into negotiations with South Africa to determine mutually-acceptable compensation (this is not financial but usually comprises proportional tariff countermeasures to essentially match damage suffered). If it refuses to provide compensation, then SA can apply for legal permission to retaliate by unilaterally implanting such countermeasures.

The true scale of the damage will only become apparent as the current citrus season draws to a close, but given that the same measures could be in place still for 2023, the cost to the EU of any countermeasures will only climb. It is hoped that the parties can reach an amicable, fair solution speedily to the dispute, as the damage to the trading relationship and global perception of the EU as a reliable trade partner is harder to calculate.