6.146. Consequently, we uphold the Panel's finding, in paragraphs 7.219 and 8.1.b.iv of the Panel Report, that Türkiye has not established that the localisation requirement is justified under Article XX(b) of the GATT 1994.

6.147. Having upheld the Panel's finding that the localisation requirement is not justified under Article XX(b), we proceed to address Türkiye's alternative claim pertaining to Article XX(d) of the GATT 1994.

6.4 Article XX(d) of the GATT 1994

6.148. In the event that we do not find that Türkiye has established that "the localisation [requirement] falls within the scope of Article III:8(a) of the GATT 1994 and/or is not inconsistent with Article III:4 of the GATT 1994", and if we also do not reverse the Panel's findings under Article XX(b) of the GATT 1994 and do not find that the measure is justified under Article XX(b), Türkiye submits that the Panel erred in finding that the localisation requirement is not justified under Article XX(d) of the GATT 1994.[294]

6.149. We begin by briefly summarizing the Panel's findings, before turning to consider relevant issues raised in this Arbitration.

6.4.1 Panel findings

6.150. With respect to Türkiye's invocation of the general exception in Article XX(d) of the GATT 1994, the Panel found that Türkiye had failed to demonstrate that the localisation requirement was taken to (designed to) secure compliance with laws requiring Türkiye to ensure "accessible, effective and financially sustainable healthcare" for its population.[295]

6.151. In the Panel's view, Türkiye's argument under Article XX(d) was substantially the same as its argument under Article XX(b). The essence of Türkiye's arguments was that the localisation requirement was justified under Article XX(b) because it was necessary to ensure uninterrupted access to safe, effective, and affordable medicines in Türkiye, and under Article XX(d) because it was necessary to secure compliance with laws requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare. The Panel found that, given the overlap, its assessment under Article XX(b) extended *mutatis mutandis* to the analysis of the defence under Article XX(d).[296]

6.4.2 Whether the Panel applied the wrong legal standard in rejecting Türkiye's defence under Article XX(d) of the GATT 1994

6.152. Türkiye submits that the Panel's finding that the localisation requirement is not justified under Article XX(d) of the GATT 1994 is vitiated by legal error because it is based on an incorrect legal standard.[297] By relying exclusively on its legal analysis under Article XX(b) when examining Türkiye's defence under Article XX(d), the Panel disregarded the important differences between these two subparagraphs and failed to address key elements of the legal test under Article XX(d).[298] Türkiye requests us to carry out the legal analysis under Article XX(d) and conclude that the localisation requirement is justified under that provision.[299]

6.153. The European Union disagrees with Türkiye's arguments and submits that the Panel did not err by relying on an incorrect legal standard under Article XX(d). In the European Union's view, the Panel correctly limited its analysis to whether the localisation requirement was designed to secure compliance with laws and regulations requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare. The Panel correctly considered that it followed from its assessment of the

[294] Türkiye's written submission, para. 251. Türkiye requests us to reverse the Panel's findings in paragraphs 7.217-7.219 and 8.1.b.iv of the Panel Report. (Türkiye's notice of recourse to arbitration, p. 3)
[295] Panel Report, para. 7.218.
[296] Panel Report, para. 7.217-7.218.
[297] Türkiye's written submission, paras. 252, 256-260, and 279.
[298] Türkiye's written submission, paras. 261-278. At the hearing, Türkiye referred to its assertion before the Panel that its defence under Article XX(d) is distinct from its defence under Article XX(b). (Türkiye's responses to questions at the hearing (referring to Türkiye's responses to the Panel's first set of questions, para. 72))
[299] Türkiye's written submission, paras. 252 and 280-311.

evidence under Article XX(b) that Türkiye had failed to demonstrate that the localisation requirement was designed to secure compliance with laws requiring Türkiye to ensure "accessible, effective and financially sustainable healthcare" for its population. The Panel was not required to analyse the other components of the analysis under Article XX(d).[300] Should we conclude that the Panel adopted an erroneous legal standard in examining Türkiye's defence under Article XX(d), the European Union submits in the alternative that the factual findings of the panel and the undisputed facts on the panel record do not provide us with a sufficient basis to complete the analysis of the measure under Article XX(d).[301] Should we conclude that we can complete the analysis under Article XX(d), the European Union submits in the further alternative that the localisation requirement is not justified under Article XX(d).[302]

6.154. Article XX(d) of the GATT 1994 provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> …
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

6.155. Article XX(d) allows Members to maintain measures that are otherwise inconsistent with obligations under the GATT 1994, to the extent that those measures are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994, and are applied in a manner that is compatible with the requirements in the *chapeau* of Article XX. Like in the case of Article XX(b), for an exception under Article XX(d) to apply, the responding party bears the burden of invoking the provision and demonstrating that the measure in question meets the requirements of that provision.

6.156. Starting with the text of the provision, to be justified under Article XX(d), a measure must be necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. In order to assess whether a measure can be justified under Article XX(d), a panel may first assess, as an initial question, whether the measure is even related to, or not incapable of, securing compliance with the specific rules, obligations, or requirements. Logically, unless a measure is "not incapable" of securing compliance with specific rules, obligations, or requirements under the relevant provisions of the relevant "laws or regulations", then the measure cannot be justified under Article XX(d), and this would be the end of the inquiry.

6.157. In order to ascertain whether a measure is not incapable of securing compliance with specific laws or regulations, a panel should focus on examining the relationship between the challenged measure, considering its design (including its content, structure, and expected operation) and the proclaimed objective. The prior examination is used to assess whether the measure can be considered to have been "taken to", or "designed to", secure compliance with relevant laws or regulations. If the response to this question is affirmative, a panel may move to assess whether the measure can be considered to be "necessary" for the proclaimed objective, considering factors such as the extent of the contribution to the achievement of the objective, the measure's trade-restrictiveness, and the importance of the interests or values at stake, as well as comparing the measure with possible alternative measures identified by the complainant.

[300] European Union's written submission, paras. 209 and 211-223.
[301] European Union's written submission, paras. 210 and 224-228.
[302] European Union's written submission, paras. 210 and 229-241.

6.158. This two-step analysis of the design and the necessity of a measure has been used in previous disputes[303] and corresponds to the manner in which the parties articulated their arguments both before the Panel as well as in the Arbitration.[304]

6.159. As noted above, the Panel found that Türkiye had failed to establish that the localisation requirement was taken to (designed to) secure compliance with laws requiring Türkiye to ensure "accessible, effective and financially sustainable healthcare" for its population. In light of the required elements for analysis under Article XX(d), normally such a conclusion would have been preceded by an examination of: (i) whether Türkiye had properly identified relevant laws or regulations that can qualify as "laws or regulations" within the meaning of Article XX(d)[305]; (ii) whether those laws or regulations were not found to be "inconsistent with the provisions of the [GATT 1994]"; and (iii) whether there was a rational relationship between the localisation requirement and the proclaimed objective, namely, whether the localisation requirement was not incapable of securing compliance with the specific rules and obligations under the relevant laws or regulations. These elements are cumulative, so that the lack of even one of them would have been sufficient for the Panel to reject the Article XX(d) defence.

6.160. In our view, it would have been more prudent had the Panel followed the order of the relevant analysis and articulated the applicable legal standard in assessing Türkiye's invocation of Article XX(d) of the GATT 1994. In other words, logically and analytically, it would have been more reasonable for the Panel to consider first which specific legal instruments were identified by Türkiye as the relevant "laws or regulations", whether such instruments qualified as "laws or regulations" within the meaning of Article XX(d), and whether they were not inconsistent with provisions of the GATT 1994, before turning to the examination of the relationship between the localisation requirement and the specific laws or regulations for the purposes of its "design" analysis.

6.161. The Panel did not follow the order of analysis suggested above. Specifically, there is no express confirmation in the Panel Report of the relevant laws or regulations cited by Türkiye, nor any examination of the characteristics of those instruments to confirm whether they could qualify as "laws or regulations" within the meaning of Article XX(d). The Panel also did not address whether the relevant laws or regulations were not inconsistent with the GATT 1994. In addition, the Panel Report is silent on the applicable legal standard for the Article XX(d) defence.

6.162. In this connection, at the Panel stage, the European Union disputed that the legal instruments cited by Türkiye had the required degree of specificity and normativity to qualify as "laws or regulations" within the meaning of Article XX(d).[306] Nevertheless, the Panel seems to implicitly have assumed, for the sake of focusing its analysis on the relationship issue[307], that the legal instruments cited by Türkiye could qualify as "laws or regulations" for the purposes of Türkiye's Article XX(d) defence[308] and that, as argued by Türkiye, the relevant obligation contained in those

[303] See e.g. Appellate Body Report, *India – Solar Cells*, para. 5.58.

[304] See e.g. Türkiye's first written submission to the Panel, paras. 539-548; second written submission to the Panel, paras. 235-246; written submission, paras. 258 and 268; European Union's second written submission to the Panel, paras. 202-203; written submission, paras. 213-214.

[305] Some relevant elements in this regard could include: the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; the degree of specificity of the relevant rule; whether the rule is legally enforceable; whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and the penalties or sanctions that may accompany the relevant rule. (See e.g. Appellate Body Reports, *India – Solar Cells*, para. 5.106 et seq.; *Mexico – Taxes on Soft Drinks*, para. 70)

[306] European Union's second written submission to the Panel, paras. 207-213.

[307] At the Panel stage, when considering the justification of Türkiye's invocation of Article XX(d), the parties to an important degree focused on whether there was evidence of a relationship between the localisation requirement and the proclaimed objective (i.e. securing compliance with laws requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare for its population). (European Union's second written submission to the Panel, paras. 203-206; Türkiye's second written submission to the Panel, paras. 235-246) In this Arbitration, Türkiye has not challenged the legal standard applicable under Article XX(d).

[308] Panel Report, para. 7.218.

legal instruments was for Türkiye to ensure accessible, effective, and financially sustainable healthcare.[309]

6.163. On the basis of those assumptions, the Panel considered whether the localisation requirement could be found to be a measure taken to secure compliance with the laws and regulations cited by Türkiye. The Panel noted the overlap between the arguments advanced by Türkiye in its allegation that the localisation requirement is justified under Article XX(b) because it is necessary to ensure uninterrupted access to safe, effective, and affordable medicines in Türkiye, and those advanced in the allegation that the same measure is justified under Article XX(d) because it is necessary to secure compliance with laws requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare.[310]

6.164. Given the overlap between both defences, the Panel was of the view that the considerations made in its assessment of Türkiye's defence under Article XX(b) in this case could be extended *mutatis mutandis* to the analysis of Türkiye's defence under Article XX(d).[311] To recall, the Panel had concluded that Türkiye had failed to demonstrate that the localisation requirement was a measure designed to (taken to) protect human life or health.[312] With respect to Türkiye's invocation of Article XX(d), the Panel concluded that Türkiye had failed to demonstrate that the localisation requirement was taken to secure compliance with laws requiring Türkiye to ensure "accessible, effective and financially sustainable healthcare" for its population.[313]

6.165. We now turn to examine whether the method of analysis followed by the Panel as described above constitutes a legal error. We do not consider that it does for the following reasons.

6.166. To begin with, the Panel appears to have taken Türkiye's description of the relevant legal instruments at face value, and assumed *arguendo* that the legal instruments cited could be said to "*require* Türkiye to ensure accessible, effective, and financially sustainable healthcare" for its population.[314] Considering this assumption, the Panel focused on whether the localisation requirement was taken to (designed to) secure compliance with laws requiring Türkiye to ensure the proclaimed objective.

6.167. On the basis of its prior finding under Article XX(b) that the localisation requirement pursues industrial policy rather than the alleged objective of ensuring a continuous supply of safe, effective, and affordable pharmaceutical products, and considering the equivalent arguments advanced by Türkiye in its Article XX(d) defence, the Panel seems to have implicitly but necessarily reached an intermediate finding that there is no rational relationship between the localisation requirement and the proclaimed objective of securing compliance with laws or regulations requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare. We also understand the Panel's *mutatis mutandis* application to suggest that a similar intermediate finding may apply in the context of Article XX(d). In light of the manner in which Türkiye articulated its justification for the localisation requirement under Article XX(d), it does not seem to constitute a legal error for the Panel to have extended elements of its assessment under Article XX(b) *mutatis mutandis* to the analysis of Türkiye's defence under Article XX(d).

6.168. We note once again that all the conditions and relevant elements for Article XX(d) are cumulative in nature. Hence, even without the Panel's examination of the laws or regulations cited by Türkiye and their qualification under Article XX(d), the Panel's intermediate finding on the lack of rational relationship between the localisation requirement and the proclaimed objective, which was made on the basis of the Panel's *mutatis mutandis* application, was sufficient for the Panel to conclude that the localisation requirement was not taken to secure compliance with the relevant laws or regulations, even if taken at face value as described by Türkiye.

---

[309] Panel Report, para. 7.217.
[310] Panel Report, para. 7.218.
[311] Panel Report, para. 7.218.
[312] Panel Report, para. 7.211.
[313] Panel Report, para. 7.218.
[314] Türkiye's first written submission to the Panel, para. 515. (emphasis added) "The essence of Turkey's arguments is that the measure is justified … under Article XX(d) because it is necessary to secure compliance with laws requiring Turkey to ensure accessible, effective and financially sustainable healthcare."
(Panel Report, para. 7.218)

6.4.3 Conclusion

6.169. In light of the considerations above, we find that Türkiye has not established that the Panel applied an incorrect legal standard under Article XX(d) in finding that Türkiye had failed to demonstrate that the localisation requirement was taken to secure compliance with laws requiring Türkiye to ensure accessible, effective, and financially sustainable healthcare and was therefore justified under Article XX(d) of the GATT 1994.

6.170. Having found that the localisation requirement was not a measure taken to secure compliance with laws or regulations, the Panel did not need to assess the remaining legal elements of Article XX(d) to determine the applicability of this exception, namely, whether the measure was "necessary" to secure such compliance. Moreover, because the localisation requirement did not fall under Article XX(d) and therefore was not provisionally justified under this subparagraph, it was also unnecessary for the Panel to assess whether the localisation requirement was being applied consistently with the requirements of the *chapeau* of Article XX.

6.171. Consequently, we uphold the Panel's finding, in paragraphs 7.219 and 8.1.b.iv of the Panel Report, that Türkiye has not established that the localisation requirement is justified under Article XX(d) of the GATT 1994.

7 AWARD

7.1. In light of the foregoing considerations, we make the following findings and conclusions. We recall that, pursuant to paragraph 9 of the Agreed Procedures, the findings of the Panel that have not been "appealed" in the context of this Arbitration shall be deemed to form an integral part of the Award together with our own findings.

7.1 Articles III:4 and III:8(a) of the GATT 1994

7.2. On interpretation, we consider that, under Article III:8(a) of the GATT 1994, "procurement by governmental agencies of products purchased for governmental purposes" would typically involve the procurement of products through a *purchase by* a governmental agency. However, Article III:8(a) does not contain an unequivocal requirement to that effect. We do not foreclose the possibility that, in certain circumstances, the relevant purchase transaction may be entered into by a non-governmental entity so long as the products are *procured by* a governmental agency and procurement is of products purchased for governmental purposes. We therefore find that the Panel erred in considering, as a starting point for its analysis in paragraph 7.65 of the Panel Report, that Article III:8(a) required a *purchase by* governmental agencies.

7.3. On application, central to Türkiye's first claim under Article III:8(a) is whether there is *procurement* by a governmental agency of products purchased for governmental purposes within the meaning of Article III:8(a). On the basis of the Panel's factual findings and uncontested facts on the panel record, we conclude that there is no procurement, within the meaning of Article III:8(a), by the SSI of the pharmaceutical products included in the Annex 4/A list.

7.4. For these reasons:

a. we find that the localisation requirement does not fall within the ambit of the derogation in Article III:8(a) of the GATT 1994 on the basis that there is no procurement by governmental agencies within the meaning of that provision;

b. consequently, we uphold, albeit for different reasons, the Panel's finding, in paragraphs 7.107 and 8.1.b.ii of the Panel Report, that the localisation requirement is not covered by the government procurement derogation in Article III:8(a) of the GATT 1994, and is therefore subject to the national treatment obligation in Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement; and

c. we declare the Panel's intermediate findings, in paragraphs 7.66-7.81 of the Panel Report, regarding the interpretation of the term "products purchased", as well as its intermediate finding, in paragraphs 7.90, 7.103, and 7.104, that the localisation requirement does not

involve the purchase of pharmaceutical products included in the Annex 4/A list by governmental agencies to be moot and of no legal effect.

7.5. Having upheld the Panel's finding that the localisation requirement does not fall within the ambit of Article III:8(a), it is not necessary for us to address Türkiye's conditional requests that we moot or reverse the Panel's findings under Article III:4 of the GATT 1994. Therefore:

a. we find that the Panel's finding, in paragraph 8.1.b.iii of the Panel Report, that the localisation requirement is inconsistent with the national treatment obligation in Article III:4 of the GATT 1994, remains undisturbed.

7.2 Article XX(b) of the GATT 1994

7.6. On interpretation, we do not consider that the Panel committed legal error by confusing the "design" and the "necessity" steps of the legal analysis under Article XX(b) of the GATT 1994. We also do not consider that the Panel set out a legal standard requiring a substantial degree of probability of risk for assessing whether a measure has been taken to protect human, animal, or plant life or health, in accordance with Article XX(b) of the GATT 1994, nor that the Panel introduced any quantitative dimension to the notion of risk to human life or health that unduly limited the range of public health measures that fall within the scope of Article XX(b). Finally, we disagree that the Panel erred by relying on previous panel reports dealing with provisions other than Article XX(b).

7.7. On application, to the extent that we have found no reversible error in the Panel's interpretation of Article XX(b), and considering the nature of Türkiye's application claims, we consider that Türkiye failed to establish that the Panel erred in its application of Article XX(b).

7.8. With respect to Article 11 of the DSU, we do not consider that the Panel exceeded its authority as the trier of facts and thereby failed to make an objective assessment of the matter before it.

7.9. For these reasons:

a. we uphold the Panel's finding, in paragraphs 7.219 and 8.1.b.iv of the Panel Report, that Türkiye has not established that the localisation requirement is justified under Article XX(b) of the GATT 1994.

7.3 Article XX(d) of the GATT 1994

7.10. In light of the manner in which Türkiye articulated its justification for the localisation requirement under Article XX(d) of the GATT 1994, we consider that it did not constitute legal error for the Panel to have extended elements of its assessment under Article XX(b) *mutatis mutandis* to the analysis of Türkiye's defence under Article XX(d). Even without the Panel's examination of the laws or regulations cited by Türkiye and their qualification under Article XX(d), the Panel's intermediate finding on the lack of rational relationship between the localisation requirement and the proclaimed objective, which was made on the basis of the Panel's *mutatis mutandis* application, was sufficient for the Panel to conclude that the localisation requirement was not taken to secure compliance with the relevant laws or regulations, even if taken at face value as described by Türkiye.

7.11. For these reasons:

a. we uphold the Panel's finding, in paragraphs 7.219 and 8.1.b.iv of the Panel Report, that Türkiye has not established that the localisation requirement is justified under Article XX(d) of the GATT 1994.

7.4 Recommendation

7.12. Pursuant to Article 19.1 of the DSU[315], we recommend that Türkiye bring into conformity with its obligations under the GATT 1994 its measures that were found to be inconsistent in this Award and in the Panel Report[316] as modified by this Award.

[315] "Where applicable, the arbitration award shall include recommendations, as envisaged in Article 19 of the DSU." (Agreed Procedures, para. 9)

[316] In accordance with paragraph 5 of the Agreed Procedures, the Panel Report can be found as an attachment to Türkiye's notice of recourse to arbitration. (WT/DS583/12 and WT/DS583/12/Add.1)