FURTHER WRITTEN SUBMISSION FROM UKRAINE

ПОСОЛЬСТВО УКРАЇНИ У ФЕДЕРАТИВНІЙ РЕСПУБЛІЦІ НІМЕЧЧИНА

Альбрехтштрассе, 26
10117 Берлін

tel: 030/28887-0
fax: 030/28887-163
e-mail: ukremb@t-online.de
www.mfa.gov.ua/germany

BOTSCHAFT DER UKRAINE IN DER BUNDESREPUBLIK DEUTSCHLAND

Albrechtstraße, 26
10117 Berlin

Mr. Dan Bondi Ogolla,
Secretary
Compliance Committee
UNFCCC secretariat

P.O. Box 260124
D-53153 Bonn
Germany

Fax: +49 228 815 1999
E-mail: Compliance.Committee@unfccc.int

27th September 2011
№61212/24-645-1836

Dear Mr. Bondi Ogolla,

In reply to our notification for the Compliance Committee's Secretariat, please find enclosed herewith the further written submission of Ukraine under Section X, paragraph 1 (e) of the annex to decision 27/CMP.1, with regard to the Question of Implementation raised and the preliminary findings adopted by the Compliance Committee through its Enforcement Brunch, concerning the annual GHG inventory submission of Ukraine submitted in 2010.

We hereby also would like to provide the attached list of individuals who will be attending on behalf of Ukraine the 15th meeting of the enforcement branch, which will be held from 11 to 12 October 2011.

Attachments:

1. The further written submission of Ukraine;
2. The list of participants on behalf of Ukraine.

Sincerely,

Extraordinary and Plenipotentiary
Ambassador of Ukraine

N.Zarudna

FURTHER WRITTEN SUBMISSION OF UKRAINE

Under Section X, paragraph 1 (e) of the "Procedures and mechanisms relating to compliance under the Kyoto Protocol" (Annex to Decision 27/CMP.1)

In Response to the Preliminary Finding of the Enforcement Branch of the Compliance Committee
(CC-2011-2-6/Ukraine/EB)

Kiev, 27 September 2011

FURTHER WRITTEN SUBMISSION OF UKRAINE

Under Section X, paragraph 1 (e) of the "Procedures and mechanisms relating to compliance under the Kyoto Protocol" (Annex to Decision 27/CMP.1)

In Response to the Preliminary Finding of the Enforcement Branch of the Compliance Committee
(CC-2011-2-6/Ukraine/EB)

27 September 2011

PREFACE

1. Ukraine is pleased to present this further written submission to the enforcement branch of the Compliance Committee under Section X, paragraph 1 (e) of the "Procedures and mechanisms relating to compliance under the Kyoto Protocol" (annex to decision 27/CMP.1) (the "**Procedures and mechanisms**") in response to the preliminary finding of the enforcement branch of the Compliance Committee (CC-2011-2-6/Ukraine/EB).

2. The question of implementation relates to Ukraine's compliance with the "Guidelines for national systems for the estimation of anthropogenic greenhouse gas emissions by sources and removals by sinks under Article 5, paragraph 1, of the Kyoto Protocol" (annex to decision 19/CMP.1) and its conformity with the applicable provisions of the Kyoto Protocol and related decisions adopted by the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol.

3. The question of implementation is related to the eligibility requirement referred to in paragraph 31 (c), annex to decision 3/CMP.1, paragraph 21 (c), annex to decision 9/CMP.1 and paragraph 2 (c), annex to decision 11/CMP.1 as a result of which, the expedited procedures contained in section X of the Procedures and mechanisms applied.

I. BACKGROUND

4. On 3 June 2011, the secretariat received a question of implementation from an expert review team (the "**ERT"**), indicated in the report of the review of the annual

submission of Ukraine submitted in 2010 (the "**2010 ARR**") and contained in document FCCC/ARR/2010/UKR. In accordance with paragraph 1 of section VI[1] and paragraph 2 of rule 10 of the "Rules of procedure of the Compliance Committee" (the "**Rules of procedure**"), [2] the question of implementation was deemed received by the Compliance Committee on 6 June 2011.

5 The 2010 ARR results from a centralized review of Ukraine's annual submission submitted in 2010 (the "**2010 annual submission**") which was conducted from 30 August to 4 September 2010 in accordance with the "Guidelines for review under Article 8 of the Kyoto Protocol" (annex to decision 22/CMP.1).

6. The bureau of the Compliance Committee allocated the question of implementation to the enforcement branch on 13 June 2011 under paragraph 1 of section VII, in accordance with paragraphs 4 (b) and (c) of section V and paragraph 1 of rule 19 of the Rules of procedure.

7. On 14 June 2011, the secretariat notified the members and alternate members of the enforcement branch of the question of implementation, in accordance with paragraph 2 of rule 19 of the Rules of procedure, and of its allocation to the enforcement branch.

8. On 29 June 2011, the enforcement branch decided, in accordance with paragraph 2 of section VII and paragraph 1 (a) of section X, to proceed with the question of implementation (CC-2011-2-2/Ukraine/EB).

9. As indicated above, the question of implementation relates to compliance with the "Guidelines for national systems for the estimation of anthropogenic greenhouse gas emissions by sources and removals by sinks under Article 5, paragraph 1, of the Kyoto Protocol" (annex to decision 19/CMP.1) (the "**Guidelines for national systems**"). In particular, the ERT found that the national system of Ukraine failed to perform some of the general and specific functions required by the Guidelines for national systems and that the national system did not ensure that Ukraine's 2010 annual submission was sufficiently transparent, consistent, comparable, complete and accurate, as required by the Guidelines for national systems, the "Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol" (annex to decision 15/CMP.1), the UNFCCC reporting guidelines, [3] the "Intergovernmental Panel on Climate Change (IPCC)

[1] All section references in this document refer to the "Procedures and mechanisms relating to compliance under the Kyoto Protocol" contained in the annex to decision 27/CMP.1.

[2] All references to the rules of procedure in this document refer to the rules contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4.

[3] "Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual inventories" contained in FCCC/SBSTA/2006/9.

Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories," and the "IPCC Good Practice Guidance for Land Use, Land-Use Change and Forestry (LULUCF)." The ERT also found that the national system is not able to ensure that areas of land subject to LULUCF activities under Article 3, paragraphs 3 and 4, of the Kyoto Protocol are identifiable in accordance with paragraph 20 of the "Definitions, modalities, rules and guidelines relating to land use, land-use change and forestry activities under the Kyoto Protocol" (annex to decision 16/CMP.1).

10. The question of implementation is related to the eligibility requirement referred to in paragraph 31 (c), annex to decision 3/CMP.1, paragraph 21 (c), annex to decision 9/CMP.1, and paragraph 2 (c), annex to decision 11/CMP.1. Consequently, the expedited procedures as contained in section X apply.

11. On 6 July 2011, the enforcement branch agreed to invite four experts drawn from the UNFCCC roster of experts to provide advice to the branch (CC-2011-2-3/Ukraine/EB). Two of these experts were part of the ERT that reviewed Ukraine's 2010 annual submission.

12. On 19 July 2011, the enforcement branch received a request for a hearing from Ukraine (CC-2011-2-4/Ukraine/EB), which also indicated that Ukraine intended to make a written submission under paragraph 1 (b) of section X.

13. On 3 August 2011, the enforcement branch received a written submission (CC-2011-2-5/Ukraine/EB) in accordance with paragraph 1 of section IX, paragraph 1 (b) of section X, and rule 17 of the Rules of procedure. Ukraine included in this submission a detailed and updated account of its efforts to comply.

14. On 24 August 2011, the enforcement branch held a hearing in accordance with paragraph 2 of section IX and paragraph 1 (c) of section X. The hearing formed part of the meeting of the enforcement branch that was held from 22 to 27 August 2011, *inter alia*, to consider the adoption of a preliminary finding or a decision not to proceed further. During the hearing, Ukraine made a presentation. The enforcement branch received advice from the four invited experts during the meeting.

15. In its deliberations, the enforcement branch considered the 2010 ARR, the written submission of Ukraine contained in document CC-2011-2-5/Ukraine/EB, information presented by Ukraine during the hearing, both orally and in writing, and advice from the experts invited by the branch. No competent intergovernmental or non-governmental organization provided any information under paragraph 4 of section VIII.

16. On 30 August 2011, Ukraine received notice that the enforcement branch of the Compliance Committee had adopted a preliminary finding relating to Ukraine in document CC-2011-2-6/Ukraine/EB. In this notice, the secretariat invited Ukraine to make a further written submission within four weeks of its date of receipt.

17. The findings and consequences contained in the preliminary finding will only take effect if and when confirmed by a final decision of the enforcement branch.

The following is Ukraine's further written submission.

II. REASONING

On the method and approach adopted by the Compliance Committee and the enforcement branch's failure to draw the adequate procedural considerations out of the situation of Ukraine as a country included in Annex I undergoing the process of transition to a market economy

18. At the outset, Ukraine would like the recall the factual elements developed in its written submission CC-2011-2-5/Ukraine/EB of 3 August 2011 in response to the decision of the Compliance Committee CC-2011-2-2/Ukraine/EB of 29 June 2011.

19. In the conclusion to this written submission –paragraphs 66 to 75– Ukraine recalled the determining fact that, as a country undergoing the process of transition to a market economy under Annex I of the United Nations Framework Convention on Climate Change of 9 May 1992 (the "**Convention**") and Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1998 (the "**Protocol**"), it deserves the benefit of the various provisions applicable to Parties pertaining to this specific category of nations (*see* in particular paragraph 66).

20. Hence, Ukraine respectfully considers that the Compliance Committee unfortunately did not exert the appropriate adapted degree of analysis required in its examination of the factual arguments then raised by Ukraine. As a consequence, Ukraine would therefore like to recall in this respect the following grounds.

21. In its preamble, the Convention recognized that *"(...) States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries (...)."*(*see* paragraph 10) [Emphasis added]

22. Although this paragraph refers in priority to developing countries, one must acknowledge here the generality of the terms of the Convention. Besides, Ukraine has already drawn the attention of the enforcement branch to the fact that the GDP per capita in Ukraine is not only the lowest among all countries in Annex I but also significantly lower than the per capital GDP in many countries not included in Annex I (*see* CC-2011-2-5/Ukraine/EB of 3 August 2011, paragraph 55). These are elements the enforcement branch ought to incorporate in its overall appraisal of Ukraine's efforts to meet the Protocol's requirements.

23. In this perspective, the preamble alone sheds light as to how the Compliance Committee –in both its facilitation and enforcement missions– should regard nations striving to meet climate change requirements in their respective challenging environments.

24. Furthermore, at Article 4, paragraph 6, of the Convention, the Parties also expressly determined that *"In the implementation of their commitments under paragraph 2 above, a certain degree of flexibility shall be allowed by the Conference of the Parties to the Parties included in Annex I undergoing the process of transition to a market economy, in order to enhance the ability of these Parties to address climate change, including with regard to the historical level of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol chosen as a reference."* [Emphasis added]

25. By stipulating in the preamble of the Convention the need to take into account the socio-political context in which environmental legislation applies and costs associated thereto, on the one hand, and in the Convention the necessity to afford Parties included in Annex I undergoing the process of transition to a market economy a certain degree of flexibility, on the other hand, the Parties did not call for leniency.

26. The Parties called in fact for the acknowledgement that, in certain circumstances, countries facing economic hardship and/or institutional, organizational, administrative or technical difficulties shall be given by the Compliance Committee the required leeway to adapt in consideration of their degree of development and of challenges faced in their implementing the Convention and subsequent acts.

27. When addressing the details of the appropriate means to be implemented to globally address climate change through action of greenhouse gases emissions, the Protocol forcefully reiterates the same approach.

28. Article 3, paragraph 6, of the Protocol provides that *"Taking into account Article 4, paragraph 6, of the Convention, in the implementation of their commitments under this Protocol other than those under this Article, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties to this*

Protocol to the Parties included in Annex I undergoing the process of transition to a market economy." [Emphasis added]

29. Again, it results from the foregoing that in the very implementation of the Protocol itself, the same approach shall therefore have to be adopted by the Conference of the Parties serving as a meeting of the Parties to the Protocol *vis-à-vis* Parties included in Annex I undergoing the process of transition to a market economy.

30. It is important to note here that the language of the Convention is not neutral. It actually mandates ("*shall*") the Conference of the Parties to be flexible towards these countries which suggests, as a consequence, that within the purview of its prerogatives, the Conference of the Parties is actually bound to apply flexibility.

31. The same is further recalled in two instances in the Procedures and mechanisms.

32. First, Article I provides that *"The objective of these procedures and mechanisms is to facilitate, promote and enforce compliance with the commitments under the Protocol."* [Emphasis added]

33. Second, in keeping with the Convention and Protocol, Article II paragraph 11 of the Procedures and mechanisms also provides that "*The Committee shall take into account any degree of flexibility allowed by the Conference of the Parties serving as the meeting of the Parties to the Protocol, pursuant to Article 3, paragraph 6, of the Protocol and taking into account Article 4, paragraph 6, of the Convention, to the Parties included in Annex I undergoing the process of transition to a market economy.*" [Emphasis added]

34. In view of the above, the notion of flexibility to be applied to Parties included in Annex I undergoing the process of transition to a market economy appears of paramount importance in the handling by the Compliance Committee of the situation and efforts of these countries in meeting the exigencies of the Protocol.

35. Ukraine respectfully points out that such flexibility must be applied when considering and drawing consequences of the implementation of Ukraine's commitments under the Convention, the Protocol and the relevant decisions of the Conference of the Parties serving as the meeting of the Parties, thereby giving Ukraine the full measure and of its status as a Party included in Annex I undergoing the process of transition to a market economy.

36. In this regard, it shall be the enforcement branch's duty to apply such flexibility to the fullest extent of its meaning in order to ensure that any declaration of non-compliance by the enforcement branch is eventually based on the actual situation of the concerned Party at the date of any such decision.

37. For so doing, the enforcement branch shall therefore afford the Party in issue the minimal opportunity to provide such information in particular when such information shall, according to Ukraine, be readily available concurrently with the 11-12 October meeting in the course of which a final decision is to be taken (*see also infra*).

38. As will be detailed in the following paragraphs, the enforcement branch has the means and authority to be provided with up-to-date and accurate information on reportedly all unresolved problems within a reasonably short time frame and hence must defer any decision likely to be based on outdated and therefore potentially inaccurate information. Refusing to utilize such means and to exert such authority would constitute a denial of the flexibility granted by the Convention, the Protocol and the Procedures to Parties like Ukraine.

On the substance of the preliminary finding of the Compliance Committee

39. Ukraine would further like to stress that, in view of the factual circumstances exposed in its written submission CC-2011-2-5/Ukraine/EB of 3 August 2011, the consequences applied by the enforcement branch in its decision CC-2011-2-6/Ukraine/EB of 25 August 2011, run against the principle referred to in paragraph 6 of section V of the Procedures and mechanisms.

40. According to these provisions, *"The consequences of the non-compliance with Article 3, paragraph 1, of the Protocol to be applied by the enforcement branch shall be aimed at the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply."* [Emphasis added]

41. Indeed, in declaring Ukraine in non-compliance, in ordering Ukraine to develop the plan referred to in paragraph 1 of section XV and in suspending Ukraine's eligibility to participate in the mechanisms of the Protocol [*see* decision CC-2011-2-6/Ukraine/EB of 25 August 2011, paragraphs 24 (a) through (c)], the enforcement branch would provide in fact no incentive to Ukraine to comply and would to no extent reward the country for the very significant efforts already demonstrated and documented.

42. To the contrary, the enforcement branch's stance appears unduly penalizing while circumstances elaborated upon by Ukraine as well as facts commented upon by the experts invited by the enforcement branch on the occasion of the 24 August 2011 hearing (*see*, CC-2011-2-6/Ukraine/EB, paragraph 10) demonstrate genuine progress and a status close to completion and hence, to compliance. These alone call for incentive measures, not punitive ones.

43. The experts' advice in particular *"highlighted that the resolution of the unresolved problems might be achieved in a relatively short time frame, e.g., in the 2011 or the 2012 annual submission."* (*id.*, paragraph 17) [Emphasis added]

44. In its own words, the enforcement branch was equally supportive, affirming that *"after considering the 2010 ARR, the written submission of Ukraine, the presentation by Ukraine at the hearing and the presentations and advice received from the invited experts, the enforcement branch was encouraged by the willingness and commitment shown by Ukraine to address unresolved problems with respect to the specific and general functions of the nation al system."* (*id.*, paragraph 18) [Emphasis added]

45. Yet, despite Ukraine's endeavor to adopt the adequate course of action under the Protocol, despite the enforcement branch's own acknowledgment of such momentum, despite the experts' determination that the resolution of unresolved problem was at hand, the enforcement branch issued a preliminary finding which, far from constituting an incentive as per Article 3, paragraph 1, of the Protocol, deliberately appears to ignore Ukraine's efforts and concludes as negatively as if Ukraine had stood still and deaf to the Protocol's requirements.

46. In so doing, the enforcement branch incomprehensibly declines to adopt discretion while the very terms of the Procedures and mechanisms actually entitle it to exercise such discretion.

On the refusal of the enforcement branch to extend the time frame of the procedure

47. As per section X, paragraph 1, of the Procedures and mechanisms, where a question of implementation relates to eligibility requirements under Articles 6, 12 and 17 of the Protocol, sections VII to IX of such Procedures and mechanisms apply, subject to specific timeframes enumerated at section X governing expedited procedures.

48. Yet, although the question of implementation raised in Ukraine's case was deemed to relate to eligibility and was thus examined under the expedited time frames of section X, the provisions of this section still afford the enforcement branch a certain margin of maneuver to accommodate cases which so require.

49. In this respect, section X, paragraph 1, subparagraph (g), of the Procedures and mechanisms provides indeed that *"The periods of time stipulated in section IX* [*e.g.*, the ones governing the standard procedure before the enforcement branch] *shall apply only if, in the opinion of the enforcement branch, they do not interfere with the adoption of decisions in accordance with subparagraphs (d) and (f) (…)."* [of section X, paragraph 1]

50. As a consequence, in view of the circumstances, Ukraine considers that the enforcement branch could in fact have resorted to section IX, paragraph 11, of the Procedures and mechanisms which provides that: *"The enforcement branch, when circumstances of an individual case so warrant, may extend any time frames provided for under this section"* [Emphasis added] in the prior stages of the procedure before adopting its preliminary finding.

51. In acting otherwise, the enforcement branch showed little regard to Ukraine's situation and deprived the country of an opportunity to complete its case in a more flexible, and nevertheless legal, framework.

52. Hence, Ukraine can only regret that in decision CC-2011-2-6/Ukraine/EB, paragraph 22, the enforcement branch merely concluded that: *"(a) The circumstances of the present case referred to by Ukraine do not warrant deferral of the adoption of a preliminary finding under paragraph 11 of section IX"* without elaborating further on its actual motives.

On the obligation for the enforcement branch to consider the facts of the matter as they stand on the day of its final decision

53. The deferral requested earlier by Ukraine [*see* CC-2011-2-5/Ukraine/EB, paragraph 76, subparagraph (a)], was justified by the necessity that the enforcement branch be provided with all the information effectively available regarding a given case for it to take an informed and updated final decision.

54. In this respect, Ukraine's request for this deferral remains notably justified by the impending performance of an in-country review of its annual inventory submitted in 2011 and therefore by the necessity for the enforcement branch to defer its decision until the initial feedback from such review. Based on the circumstances, this review can only confirm the satisfactory nature and outcome of the efforts developed by Ukraine already noted by the branch.

55. The necessity for the branch to consider the facts of the matter at the time it takes its final decision is warranted and illustrated by the enforcement branch's own decision making process.

56. For example, in its decision CC-2008-1-6/Canada/EB of 15 June 2008 relating to Canada, the enforcement branch concluded that despite *"non-compliance with the guidelines and the modalities on the publication date of the review report,"* there was *"sufficient factual basis to avert a finding of non-compliance on the date of the decision."* [*id.,* paragraph 17 (a) and (b)] [Emphasis added]

57. Ukraine respectfully requests that the same practical and factual approach be adopted by the enforcement branch in the case in issue, as failure to consider complementary information to be provided at about the time of the enforcement branch meeting of 11-12 October 2011 would result in the taking of a not only premature decision but also of a factually inaccurate one.

58. This argument was previously raised by Ukraine in the conclusions to its CC-2011-2-5/Ukraine/EB of 3 August 2011 written submission whereby Ukraine stressed in particular that *"As a result of the review taking longer than provided for in the annex to decision 22/CMP.1, more than a year* [had] *has passed since the start of the review. The information presented to the ERT in the final annual review report no longer corresponds to the actual state of affairs in the national system of Ukraine."* (paragraph 71).

59. Consequently, Ukraine reiterates its request that the matter be re-examined on the basis of the latest factual developments.

60. Indeed, Ukraine contends that there are already and will shortly be new and positive factual grounds for the enforcement branch to alter its preliminary finding.

61. Failure of the enforcement branch to agree to this approach could only result in the automatic confirmation of the preliminary findings, a process which neither the Protocol nor the Procedures and mechanisms actually warrant.

62. As a matter of fact, the language of section IX, paragraph 7, of the Procedures and mechanisms make it clear that, as a consequence of the provision of a further written submission of the concerned Party, it is the prerogative of the enforcement branch to confirm the preliminary finding, *"as a whole or any part of it to be specified."*

63. The above implies that, in that period between the issuance of the preliminary finding and the adoption of a final decision, the enforcement branch shall have to take into account any fact likely to alter the basis of its preliminary finding and therefore alter its final decision.

On the possibility for the enforcement branch to adapt consequences which it applies

64. Section XV, paragraph 1, of the Procedures and mechanisms provides that *"Where the enforcement branch has determined that a Party is not in compliance with Article 5, paragraph 1 or paragraph 2, or Article 7, paragraph 1 or paragraph 4, of the Protocol, it shall apply the following consequences, taking into account the cause, type, degree and*

frequency of the non-compliance of that Party (...).” [consequences omitted] [Emphasis added]

65. As a consequence of the above, and assuming the enforcement branch pursues an unaltered non-compliance decision which shall carry all the consequences enumerated at section XV, it shall also have to take into account the specifics of the Ukraine case and take into account the *“cause, type or degree”* of non-compliance in issue.

66. Needless to say that efforts demonstrated by Ukraine and acknowledged by the enforcement branch and its experts as well as the situation of Ukraine as a Party included in Annex I undergoing the process of transition to a market economy should heavily weigh in favor of Ukraine and lead the enforcement branch to consider ways of adapting its final decision accordingly.

67. It is worth noting in this respect that it is customary for final decisions of the enforcement branch to expressly specify that the consequences of the relevant paragraphs of the preliminary findings are deemed to form an integral part of the final decision and to further indicate that they *“shall take effect forthwith”* (*see e.g.*, CC-2009-1-8/Croatia/EN of 26 November 2009, paragraph 6; *see* also, CC-2011-1-8/Romania/EB of 27 August 2011, paragraph 6).

68. However, neither rule 22 of the Rules of procedure, nor section XV of the Procedures and mechanisms governing consequences applied by the enforcement branch prevent the latter from adapting the conditions pursuant to which a final decision shall take effect.

69. To the contrary, discretion afforded to the enforcement branch by these provisions in this respect as well as the obligation for it to factor in the *“cause, type or degree”* of the non-compliance in issue referred to at subsection 64 above enable the enforcement branch to defer the effect of the decision over time should the branch eventually decide not to alter its substance.

III. CONCLUSION AND REQUEST

70. Based on the above, Ukraine requests the enforcement branch of the Compliance Committee:

(1) to **defer the final decision and reconsider it on the basis of the report of the review of the annual submission of Ukraine submitted in 2011** when available as per section IX, paragraph 11, of the Procedures and mechanisms,

or alternatively

(2) to confirm the preliminary finding as a whole but **defer its taking effect** to the outcome of the analysis by the enforcement branch of the in-country review of the annual inventory of Ukraine submitted in 2011 to be issued when available and **at which time** the enforcement shall either:

(i) confirm the preliminary finding as a whole (or in part); or

(ii) decide not to proceed further on the basis of new factual elements brought to its attention.

*