

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	
	:	
	:	CFTC Docket No. 99-11
GLOBAL MINERALS & METALS CORP., :	:	
R. DAVID CAMPBELL, and CARL ALM :	:	OPINION AND ORDER
	:	

This is an appeal from an order of the Administrative Law Judge (“ALJ”) compelling the Division of Enforcement (“Division”) to provide to respondents Global Minerals & Metals Corp. (“Global”), R. David Campbell and Carl Alm copies of documents it obtained from regulators in the United Kingdom. The documents were obtained by the Division from the U.K. regulators under the terms of a memorandum of understanding (“MOU”) signed by the U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”), the U.S. Securities and Exchange Commission (“SEC”), and the United Kingdom Securities and Investment Board and Department of Trade and Industry (“U.K. authorities”).¹ *In re Global Minerals & Metals Corp.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,199 (July 21, 2000) (“Order Compelling Production”).

The Division and *amicus* participants² urge the Commission to undertake interlocutory review of the Order Compelling Production because, in their view, the

¹ As a result of a reorganization of regulatory authority within the United Kingdom, the role formerly played by the Securities Investment Board (“SIB”) is now performed by the United Kingdom Financial Services Authority (“FSA”). References to “U.K. authorities” include both the SIB and the FSA.

² The Commission granted motions for *amicus* participation filed by the SEC and the FSA. *In re Global Minerals & Metals Corp.*, CFTC Docket No. 99-11 (CFTC September 5, 2000). The Commission’s order also expanded the page limit for respondents’ opposition brief to provide adequate space for a response to the SEC’s and FSA’s *amicus* briefs.

ALJ's interpretation of the MOU undermines expectations of confidentiality that are vital to the continuing success of the cooperative efforts of international regulators.³

Respondents contend that the ALJ's ruling rests on a straightforward construction of plain and unambiguous language contained in the MOU and insist that the Division's interests can be adequately protected by Commission review at the conclusion of the proceeding before the ALJ. As explained more fully below, we grant the Division's application for interlocutory review and vacate the Order Compelling Production.

BACKGROUND

During the late 1990s, the Division undertook an investigation into unusual price movements in the world copper market. During this investigation, the Division obtained documents from United Kingdom financial regulators pursuant to a MOU that the Commission and the SEC signed in 1991 with the United Kingdom Securities and Investment Board and Department of Trade and Industry. Eventually, the investigation led to a complaint, which the Commission brought against respondents in May 1999. The complaint alleges that, between October and December 1995, respondents attempted to manipulate the price of copper and copper futures contracts and actually succeeded in manipulating the price.

After the complaint was assigned to the ALJ for adjudication, the Division made some documents obtained during the investigation available for inspection by respondents. A number of these documents, which fall into a category that the Division

³ The Commission stayed the Division's obligation to produce the specified documents pending its consideration of the application for interlocutory review. *In re Global Minerals & Metals Corp.*, CFTC Docket No. 99-11 (CFTC September 5, 2000).

calls “evidentiary material,” were obtained from U.K. authorities pursuant to the MOU.⁴

The Division withheld other documents obtained under the MOU on the ground that the information was obtained from a foreign futures authority on the condition that the information not be disclosed, within the meaning of Commission Rule 10.42(b)(2)(v).⁵

The dispute underlying the Division’s application for review arises from the ALJ’s finding that, under the terms of the MOU, the U.K. authorities waived confidentiality when they shared these documents with the Division. To resolve this issue, we turn first to the pertinent provisions of the MOU.

According to the MOU’s preamble, a higher level of international activity in various financial markets increased the need for “mutual cooperation” among regulators. A review of the agreement’s ten “Parts”⁶ shows that the regulator-parties contemplated

⁴ The Division indicates that evidentiary material includes “account statements, order tickets, trade ledgers, and transcripts of witness interviews and testimony.” Division’s March 6, 2000 Brief On Confidentiality and Privilege at 4. It further represents, without dispute, that these materials were produced to Respondents and are not at issue in this appeal. *Id.* at 5 and Division’s August 22, 2000 Application for Interlocutory Review at 4.

⁵ Rule 10.42(b)(2)(v) provides that:

The Division of Enforcement may withhold any document that would disclose:
.....
Information obtained from a domestic or foreign governmental entity or from a foreign futures authority that either is not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed or that it only be disclosed by the Commission or a representative of the Commission as evidence in an enforcement or other proceeding.

According to the Division, the withheld documents fall into four categories: (1) draft investigative reports and letters discussing investigative reports; (2) letters relating to procedures, analysis and strategies in an ongoing investigation; (3) letters relating to the exchange of information pursuant to the MOU; and (4) letters that accompanied evidentiary material. Division’s March 6, 2000 Brief On Confidentiality and Privilege at 4.

⁶ The agreement has ten Parts and a separate Definitions section.

cooperative efforts that included: (1) consultations on matters of mutual interest,⁷ (2) the provision of information already collected by one regulator to a fellow regulator,⁸ (3) the collection of new information by one regulator on behalf of a fellow regulator,⁹ (4) joint collection of new information within a fellow regulator's country,¹⁰ and (5) offers to provide a fellow regulator with information raising a clear suspicion that the fellow regulator's legal requirements have been breached.¹¹ Paragraph 16 defines the purposes for which information shared under the MOU may be used, which include "conducting civil or administrative enforcement proceedings . . . or conducting any investigation related thereto."

The confidentiality provisions at issue in this matter are contained in Paragraphs 17 and 19 of the MOU. Paragraph 17 provides that:

The requesting Authority will keep confidential any information provided under this Memorandum subject to the terms of this paragraph, unless it is disclosed in furtherance of the purpose for which it was requested under paragraph 16 above:

- (a) except as contemplated by paragraph 16 above, the requesting Authority will not offer the information to, and will use its best efforts to ensure that it is not obtained by, any other person. Unless otherwise agreed, in the event that such information is obtained by any public body, the requesting Authority will use its best efforts to ensure that it will not be used by that body in any way that involves its disclosure to any other person;

⁷ Consultation is specifically referenced in the titles of Parts I and VIII. There are also references to consultation in Parts II (Paragraph 9), Part IV (Paragraphs 14(d) and 15), Part V (Paragraph 19), and Part VII (Paragraph 23).

⁸ Paragraph 6(a).

⁹ Paragraph 6(b), (c), and (d). The agreement describes this cooperative activity in terms of (1) questioning or taking testimony, (2) obtaining specified information and documents, and (3) conducting compliance inspections or examinations.

¹⁰ Paragraph 6(e).

¹¹ Paragraph 20.

- (b) if the requesting Authority becomes aware that the information has been or is likely to be disclosed otherwise than as contemplated by paragraph 16 above, it will inform the requested Authority of the situation; and
- (c) after the requesting Authority has terminated the matter for which assistance has been requested under this Memorandum, upon request of the requested Authority, it will return to the requested Authority, to the extent permitted by the laws of the jurisdiction of the requesting Authority, all documents and copies thereof not already disclosed in proceedings referred to in paragraph 16 above, and other material disclosing the content of such documents, other than material generated as part of the deliberative, investigative, internal or analytical process of the requesting Authority, which may be retained.

Further, Paragraph 19 provides that:

Each Authority will keep confidential to the extent permitted by law any request for information made under this Memorandum and any matters arising in the course of its operation, including consultation under this Part or Part I of this Memorandum, unless:

- (a) such disclosure is absolutely necessary to carry out the request; or
- (b) the other Authority waives such confidentiality.

A requesting Authority may specify that if the requested Authority considers such disclosure to be absolutely necessary, then the Authorities will consult before such disclosure is made.

This paragraph does not apply to general matters of proper public interest relating to the operation of this Memorandum.

The ALJ's determination that the U.K. authorities waived confidentiality when they provided the documents in question to the Division was based on the language of Paragraph 17. The ALJ found that Paragraph 17, "in the plainest of terms . . . provides that information is not confidential if used in furtherance of conducting an enforcement proceeding, such as the one here." Order Compelling Production at 50,296. Nor, in the ALJ's view, was the information protected under Paragraph 19, given "the waiver of

confidentiality set forth in Paragraph 17.” *Id.* at 50,297. The ALJ concluded, therefore, that Commission Rule 10.42(b)(2)(v) did not operate to shield the information from Respondents, and ordered the Division to disclose it subject to a protective order designed to keep the information from being revealed to nonparties. *Id.* at 50,305-307.¹²

The Division subsequently asked the ALJ to stay the deadline for producing the documents and to certify his ruling as appropriate for interlocutory review under Commission Rule 10.101(a)(5).¹³ The ALJ denied these requests in orders issued on August 15 and 17, 2000. *In re Global Minerals & Metals Corp.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,220 (August 15, 2000) (“Order Denying Certification”); *In re Global Minerals & Metals Corp.*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,221 (August 17, 2000) (“Order Denying Stay”).

In denying certification pursuant to Commission Rule 10.101(a)(5), the ALJ ruled that the proper interpretation of the MOU was “a pure question of *law* about which reasonable minds cannot differ.” Order Denying Certification ¶ 28,220 at 50,393-394. Because the underlying dispute was discovery-related, the ALJ noted that its resolution would do little to advance the ultimate determination of the case. *Id.* at 50,394. In addition, the ALJ found that a subsequent reversal of his decision would not result in any

¹² In making this ruling, the ALJ also rejected various privileges asserted by the Division, as well as arguments that the documents were protected under the common law of the United Kingdom and the common interest rule, and were not “relevant” within the meaning of Commission Rule 10.42(b)(2)(v). Order Compelling Production at 50,301-304. In addition, the ALJ opined that the U.K. Authorities could obtain Rule 10.42(b)(2)(v) protection with respect to documents shared in the future by simply requesting confidentiality at the time the documents are shared. *Id.* at 50,298 n.37.

¹³ Under Rule 10.101(a)(5), the ALJ must determine whether: (1) the ruling at issue involves a controlling question of law or policy; (2) an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and (3) subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

unnecessary delay or expense to the parties. *Id.* at 50,394-395. Finally, the ALJ determined that his interpretation of the MOU did “not raise a question of systematic legal effects that might otherwise amount to ‘extraordinary circumstances[.]’” that would justify certification. *Id.* at 50,395. In so finding, the ALJ rejected the Division’s claim that its production of the documents at issue could adversely affect future international cooperative enforcement efforts. In this regard, the ALJ stated that he could not “begin to imagine why the [U.K. authorities] . . . should be ‘chilled’ by [his] ruling.” In support, he reiterated his view that:

“In the future, in order to assure the nondisclosure of documents to the fullest extent available under the law, all the [U.K. authorities] have to do is to specifically request confidential treatment, beyond that afforded to the documents under the MOU, at the time the documents are handed over to the Commission.”

Id. at 50,395 (quoting Order Compelling Production at 50,298 n.37).

In its application for interlocutory review, the Division argues that the ALJ’s denial of certification was grossly improvident and that there are extraordinary circumstances that justify immediate review of the Order Compelling Production. It emphasizes that the proper interpretation of the MOU raises issues of first impression and that the ALJ’s interpretation is contrary to the understanding of the regulator-parties to the agreement. According to the Division, if shared information is disclosed in a manner contrary to the regulator-parties’ intent, they will be less likely to cooperate with future requests to share information. Consequently, in the Division’s view, correction of the ALJ’s error at the conclusion of this proceeding would not be sufficient to protect its interests.

In opposing the Division's application, respondents contend that the ALJ's ruling does not raise a critical or novel legal issue because the ruling rests on a "straightforward construction of the plain and unambiguous language of a contract." Respondents' Opposition at 11. Respondents also emphasize that the U.K. authorities may be confident that shared information will be kept confidential in the future if they simply issue a letter declaring that the information should be kept confidential under Commission Rule 10.42(b)(2)(v) at the time they share the information. They also note that the ALJ's protective order "guarantees that the [Order Compelling Production] will not cause any prejudice to the Division in other matters." *Id.* at 13. Finally, respondents emphasize that the Commission has been particularly reluctant to undertake immediate review of rulings related to discovery disputes. *See, e.g., In re Mayer*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,386 at 42,742 (CFTC April 26, 1995).

On the merits, the Division argues that the information it withheld constitutes consultative materials that are protected under Paragraph 19 of the MOU. In its *amicus* brief the FSA agrees that the information in question consists of consultative materials to which the confidentiality provisions of Paragraph 19 attach. The FSA states that it "at no time intended any waiver of these confidentiality provisions. . . . Indeed, letters accompanying the materials asserted confidentiality, with the usual wording being 'Confidential Law Enforcement Correspondence. FOIA protection requested' and 'The confidentiality provisions of the MOU apply, and FOIA protection is requested.'" FSA *Amicus* Brief at 2. The views set forth in the *amicus* brief submitted by the SEC are consistent with those expressed by the Division and the FSA. The SEC also submitted a declaration by Marisa Lago, the Director of the SEC's Office of International Affairs

(“OIA”).¹⁴ The declaration indicates that OIA’s ability to protect the confidentiality of consultative materials¹⁵ is “critical both to the ability of the SEC to obtain information under existing [Memoranda of Understanding] and to negotiate any future [Memoranda of Understanding].” Declaration, ¶ 6. It states that OIA does not interpret Paragraph 17 of the MOU “to waive the special protection provided to consultative materials under Paragraph 19.” Declaration, ¶ 13. Finally, the declaration concludes that the Order Compelling Production “and the uncertainty to which it subjects consultative materials likely will harm the SEC’s ability to obtain assistance under the . . . MOU.” Declaration, ¶ 14.

DISCUSSION

A. *The Application For Interlocutory Review*

When deciding whether to grant an application for interlocutory review, the Commission must determine whether there are extraordinary circumstances that justify immediate consideration of the ruling at issue. *See, e.g., In re Abrams*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,577 at 36,494 (CFTC Oct. 13, 1989). In the enforcement context, we have held that extraordinary circumstances exist when (1) the application involves a ruling that resolves issues of first impression; (2) leaving the

¹⁴ The declaration indicates that OIA plays the following roles: (1) negotiates cooperative information sharing arrangements that are documented in Memoranda of Understanding; (2) determines the proper response to requests made under existing Memoranda of Understanding; and (3) advises on the interpretation of existing Memoranda of Understanding.

¹⁵ The declaration indicates that consultative materials include “correspondence between regulators relating to (and accompanying) the exchange of information under the [Memorandum of Understanding], and investigative reports, opinions, correspondence and analyses (including drafts thereof) prepared by the regulator.” Declaration, Paragraph 8. It also explains that “[m]ost correspondence and reports shared between foreign regulators are consultations under Paragraph 19 because by addressing how various documents relate to aspects of the foreign authority’s investigation, they allow regulators to work collaboratively to ensure coordinated approaches and consistent results.” Declaration, Paragraph 11.

issues unresolved would almost certainly have a material impact on other enforcement proceedings; and (3) there is substantial doubt that an appeal at the end of the proceeding would be effective in protecting the moving party's interests. *In re Bilello*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,032 at 41,311 (CFTC March 25, 1994).

The ALJ's ruling involves the application of Commission Rule 10.42(b)(2)(v) in the context of an international agreement with U.K. authorities. We have not addressed either the regulatory provision or the relevant agreement in a reported decision. The ALJ's interpretation of the MOU renders its confidentiality provisions essentially irrelevant in the context of enforcement proceedings. The Division, the FSA, and the SEC all concur that this interpretation is so contrary to the intent of the regulator-parties to the MOU that future cooperative efforts will be threatened as long as the validity of the ALJ's interpretation remains unresolved. Finally, a determination at the end of the case that a disclosed document should have remained confidential would not be effective in protecting the Division's interest in maintaining the confidentiality of FSA documents in a manner consistent with the requirements of the MOU. Based on these factors, we find that there are extraordinary circumstances that warrant immediate review.

As noted above, the ALJ concluded that his ruling did not meet the requirements for certification established in Commission Rule 10.101(a)(5). In addition, the ALJ held that no extraordinary circumstances justified immediate review because: (1) his interpretation of the MOU was so obviously correct that reasonable minds could not differ on the issue; and (2) there was no reasonable basis for the U.K. authorities to change their stance toward mutual cooperation in light of his interpretation of the MOU. In this regard, the ALJ emphasized that his protective order limited the effect of

disclosure in this case and that U.K. authorities could protect their confidentiality interests in future cases without relying on the MOU by requesting confidentiality when documents are shared.

As discussed more fully below, the ALJ's insistence that his interpretation of the MOU is the only reasonable interpretation cannot be squared with either the language or overall purpose of the regulator-parties' agreement. Moreover, in assessing the threat his ruling posed to the Division's interests, the ALJ ignored the best evidence of the likely reaction by U.K. authorities, that is, a letter submitted by the FSA's Director of Enforcement, Daniel F. Waters, in which he describes the potential effect of the forced disclosure of consultative documents shared by the FSA with the CFTC.¹⁶

In the letter, Director Waters states first that "[w]here confidential information is disclosed pursuant to the MoU, the FSA considers that there is a clear understanding (the nature of which is supported by [Section 8(a)(1)] of the CEA) that no disclosure would occur save to the extent and in the manner provided for under the MoU."¹⁷ Waters then discusses several justifications for maintaining the confidentiality of investigative

¹⁶ The record does not suggest that the ALJ had any other reliable basis on which to evaluate how foreign regulators such as the FSA value their confidentiality interests or for determining the level of risk to those interests that is tolerable. Under the ALJ's interpretation of the MOU, it is also less than clear that U.K. authorities could protect their confidentiality interests in the future simply by requesting confidential treatment at the time any document is shared with the Commission. The ALJ ruled that Paragraph 17 of the MOU waived any common law privileges that U.K. authorities might have claimed in the context of a Commission enforcement case. Order Compelling Production at 50,300. He did not, however, address how this waiver theory would apply in the context of a separate request for confidentiality that accompanied shared information. Would the purported waiver in Paragraph 17 of the MOU—an agreement formally executed by U.K. authorities—take precedence over a confidentiality request included in a letter executed by a representative of the FSA's enforcement unit? Apparently so. As the FSA points out in its *amicus* brief, the U.K. authorities in fact requested confidential treatment in letters accompanying the material shared with the Division at the time it was provided. See also Division's August 22, 2000 Application for Interlocutory Review at 17-18 and letter from Jeremy Orme to Geoffrey Aronow dated January 22, 1996 and attached to Petition as Exhibit D. The ALJ's disregard of these specific requests for confidentiality and of the letter submitted by the FSA's Director of Enforcement suggests that he might well find that the alleged waiver in the MOU was controlling.

¹⁷ See Waters letter, dated March 6, 2000, ¶ 21.

information shared by the FSA with the CFTC, many of them compelling in their own right.¹⁸ Most significant is his statement concerning how the ALJ's approach might affect future cooperative efforts between regulators:

The FSA's policy has been, and continues to be, one of promoting co-operation with overseas regulators in the regulation of increasingly globalised markets for financial services. If appropriate and effective regulatory policy is to be maintained in respect of ensuring continued efficient mutual assistance and co-operation between overseas regulators such as the CFTC and the FSA, it is essential that the FSA should be able to communicate with the CFTC in the knowledge that confidential documentation will not be disclosed save to the extent and in the manner provided for in the MoU. *Such confidential information would not be so readily provided by the FSA if the FSA could not be sure that its confidence would be respected.*

Id. at ¶ 35 (emphasis added).

The ALJ simply failed to take account of—or ignored—obvious and stated factors militating in favor of retaining the confidentiality of these documents. Given this flaw in the ALJ's analysis, the record establishes that he abused his discretion when he refused to grant the Division's request for certification. *Compare Billello*, ¶ 26,032 at 41,310.

B. Interpretation of the MOU

Our interpretation of the MOU is guided by the same principles that guide the interpretation of treaties. *See Iceland Steamship Co. v. U.S. Dep't of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000); *see also Air Canada v. U.S. Dep't of Transp.*, 843 F.2d 1483, 1486-87 (D.C. Cir. 1988). We must begin with the language of the MOU itself.

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982). Our role is

¹⁸ Director Waters identifies the documents at issue by two, primary categories: FSA draft reports and voluntary information supplied by informants. In the course of this analysis, Waters states, disclosure of previously undisclosed draft documents stemming from the FSA's continuing investigation "would be unfair, both to the persons currently under investigation and to the FSA." *Id.* at ¶ 33. Disclosure would be unfair to the individuals because, until it has been decided what charges, if any, to bring, disclosure of documents might expose the investigated individuals to adverse professional consequences.

limited to giving effect to the intent of the parties to the MOU. *Id.* at 185. When the parties to a MOU agree as to the meaning of its provisions, and that interpretation follows from its clear language, “we must, absent extraordinarily strong evidence, defer to that interpretation.” *Id.* To the extent that the MOU’s terms are not clear, we must give great weight to the meaning attributed to them “by the Government agencies charged with their negotiation and enforcement.” *Iceland Steamship*, 201 F.3d at 458 (quoting *Sumitomo* at 184-85).

In the present case, the interpretations offered by the parties to the MOU are certainly instructive. Nevertheless, we need not defer to these interpretations because we are able to construe the intended operation of the MOU based on the plain meaning of its words; the mechanics of the relevant sections of the MOU are neither particularly complicated nor is their interaction particularly difficult to describe.

As discussed above, Paragraph 16 describes how the regulator receiving information shared under the MOU may use such information. Paragraph 16 states, in pertinent part,¹⁹ that such information is to be used “solely for the purpose of ...

¹⁹ In its entirety, Paragraph 16 reads as follows:

Information received will be used solely for the purpose of:

- (a) securing, through enquiries, investigations or litigation, compliance with or enforcement of the legal rule or requirement specified in the request, provided that the information may be used to secure compliance with or enforcement of other applicable legal rules or requirements in proceedings in which a violation of the legal rule or requirement specified in the request is alleged;
- (b) securing compliance with or enforcement of a legal rule or requirement that was not specified in the request in proceedings in which a violation of the legal rule or requirement specified in the request is not alleged, if prior to such use, the requesting Authority informs the requested Authority of its intention to use the information for such purposes and the requested Authority does not object; or

conducting civil or administrative enforcement proceedings ... or conducting any investigation related thereto for any general charge applicable to the violation of the legal rule or requirement identified in the request [for information].” Thus, the party receiving the information under this MOU—in this case the Division—is entitled to use the information from its counterpart regulator both in connection with an investigation and in the course of any subsequent civil or administrative case.

In return, the party receiving the information is expected to exercise some reasonable caution on behalf of the provider. Specifically, Paragraph 17 provides, in pertinent part, that the requesting party must “keep confidential any information provided under this Memorandum subject to the terms of this paragraph, unless it is disclosed in furtherance of the purpose for which it was requested under paragraph 16.” In keeping with the obvious intent of the MOU to keep confidential information exchanged, but not otherwise disclosed in the course of investigations or proceedings, Paragraph 17 further provides as follows:

[A]fter the requesting Authority has terminated the matter for which assistance has been requested under this Memorandum, upon request of the requested Authority, it will return to the requested Authority, to the extent permitted by the laws of the jurisdiction of the requesting Authority, all documents and copies thereof not already disclosed in proceedings referred to in paragraph 16 above, and other material disclosing the content of such documents, other than material generated as part of the deliberative, investigative, internal or analytical process of the requesting Authority, which may be retained.

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- (c) conducting civil or administrative enforcement proceedings, assisting in a criminal prosecution, or conducting any investigation related thereto for any general charge applicable to the violation of the legal rule or requirement identified in the request.

It is readily apparent that Paragraphs 16 and 17 are intended to work in tandem: Paragraph 16 provides that shared information may be used as necessary by the requesting party both to pursue investigations and conduct proceedings, and Paragraph 17 generally provides that, to the extent the information is not disclosed to another person during the course of an investigation or proceeding, it should be kept confidential. The MOU thus recognizes that when regulators share information, some of it will be useful to the investigating authority, and some if it will not. To the extent the requesting authority receives relevant, useful information, it is anticipated that it will use it in ways that will result in the disclosure of the information to third parties, either in the course of the investigation or in a subsequent proceeding. Such disclosures are both anticipated under and sanctioned by the MOU. But, to the extent the information is not used for such a purpose, the receiving authority is asked to keep it confidential and return it.

Finally, Paragraph 19 provides an additional set of protections for a second type of materials. Here, the MOU recognizes that in addition to the raw information shared by the authorities²⁰—Paragraph 16 material, or, what the Division generally refers to as evidentiary material—there will be a certain amount of communication between the regulators. As to this material—described by the parties to the MOU as “consultative” material—Paragraph 19 insists that each regulator exercise the utmost caution. Specifically, Paragraph 19 provides that the parties to the MOU must keep confidential, to the extent permitted by law, “any request for information made under this Memorandum and any matters arising in the course of its operation, including

²⁰ These materials are not at issue in this appeal; *see* footnote 4 above.

consultation.”²¹ Disclosure of this type of information is permitted only if it is “absolutely necessary to carry out the request” or the authority that supplied the information “waives such confidentiality.”

Thus, without wishing to belabor the point, it seems obvious to us that Paragraphs 16, 17 and 19 create a presumption that shared information retains its confidentiality unless disclosed to a third party in the course of an investigation or proceeding. If it is not used for one of those purposes identified in paragraph 16, it is supposed to be kept confidential. Additionally, communications between the regulators regarding the sharing of documents or their content are to remain strictly confidential unless disclosure is “absolutely necessary.”

The ALJ found otherwise through a reading of the MOU that simply cannot be reconciled with the plain meaning of the MOU’s words or any reasonable interpretation of the intent of the signatories. In the ALJ’s view, Paragraph 17 provides a blanket waiver of confidentiality for any and all information shared pursuant to a request under Paragraph 16, whether or not it is disclosed to any third party.

²¹ Paragraph 19 material would appear to include two very different types of information. On the one hand, Paragraph 19 material might include material regarding the mechanics of the exchange of information. On the other hand, Paragraph 19 might include more substantive materials such as the requests themselves (which, as a matter of necessity may include a regulator’s description of what it thinks has taken place); analyses prepared by one of the regulators; and/or draft reports reflecting preliminary findings of an investigation. The former type of information—transmittal letters, for example—would seem unlikely to contain any information relevant to a subsequent proceeding. The latter type of information would seem to encompass precisely the type of derivative, deliberative material that the regulators typically hold very closely; the analogy in private litigation would be to attorney work product. But Paragraph 19 does not require the parties to the MOU to split hairs. It simply provides that consultative material—whether it reflects merely the mechanics of information sharing, the substantive information itself, or some combination of the two—is to remain confidential. Furthermore, under Commission law, the Division is obligated to produce all material that would tend to exculpate respondents. *In re First Guaranty Metals, Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,074 at 24,340-41 (CFTC July 2, 1980) (holding, on due process grounds, that the prosecutorial disclosure rule of *Brady v. Maryland*, 373 U.S. 83 (1963), applies to Commission administrative enforcement proceedings). To the extent Paragraph 19 material would meet this description, the Division would be obligated to produce it.

As an initial matter, it would appear to us that the mere act of supplying information pursuant to the MOU demonstrates an intent to keep the information confidential. Moreover, if the ALJ's view were to prevail—i.e., that by sharing information under the MOU, the U.K. authorities necessarily waived confidentiality—one would be left to wonder why the U.S. and U.K. authorities went to the time and effort of negotiating the confidentiality provisions of the MOU in the first place. But we need not wonder; the meaning of the MOU is plain and the intent of its signatories obvious. As discussed above, the information in question was clearly provided on the condition that its confidentiality be preserved unless the Division chose to disclose it in the course of its investigation or subsequent proceeding.

Given our determination that the documents are protected by the confidentiality provisions of the MOU, we need not decide whether they are “relevant” within the meaning of Commission Rule 10.42(b)(2)(v),²² or whether they are protected by the various privileges or provisions of U.K. law asserted by the Division.

C. Related Matters

While this appeal was pending, respondents filed a motion to supplement the record with evidence that the Division had shared with its expert witness a document allegedly subject to the disclosure restrictions in Paragraph 19 of the MOU. The Division followed up with a motion requesting a briefing schedule on issues related to its obligation to produce the document in question pursuant to Commission Rule

²² As noted above, Commission Rule 10.42(b)(2)(v) permits the Division to withhold information that is either (1) “not relevant to the resolution of the proceeding”; or is (2) “provided on the condition that the information not be disclosed or that it only be disclosed . . . as evidence in an enforcement or other proceeding.” Here, the information falls within the scope of the latter provision.

10.42(a)(2).²³ These motions raise independent legal and factual issues. It is likely that a reliable resolution of the issues raised will require fact-finding regarding documents considered by the Division's witness. Consequently, we decline to reach the merits of these motions in the context of the current application for interlocutory review.

CONCLUSION

For the foregoing reasons, the Division's application for interlocutory review is granted and the ALJ's Order Compelling Production is vacated. The matter is remanded to the ALJ for further proceedings consistent with this decision.

IT IS SO ORDERED.

By the Commission (Acting Chairman NEWSOME, and Commissioners HOLUM SPEARS, and ERICKSON).

Jean A. Webb
Secretary of the Commission
Commodity Trading Futures Commission

Dated: October 3, 2001

²³ That provision requires parties who intend to call an expert witness to disclose a copy of any written information "considered by the witness in forming his or her opinion."