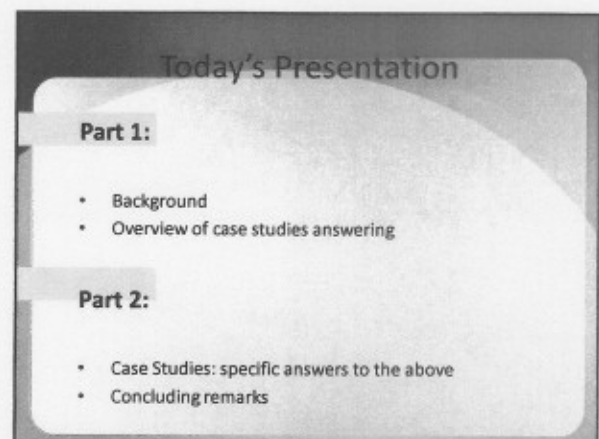
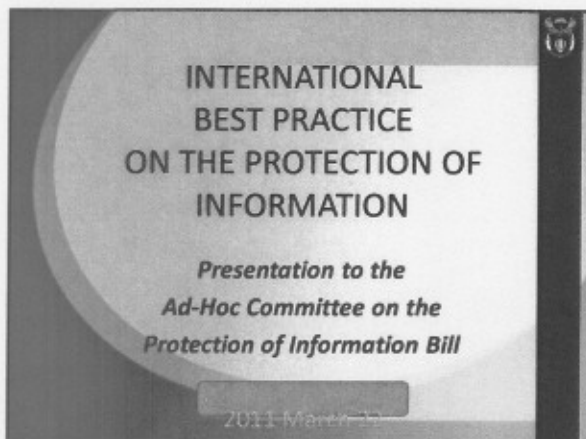


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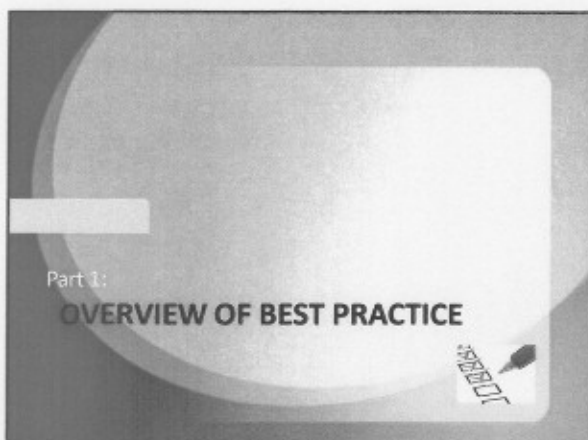


Background to the Briefing

- On 22 October 2010, Minister SC CWELE, MP, briefed the Ad-Hoc Committee
- Offered to present at the pleasure of the Ad-Hoc Committee a study on international best practice
- Ad-Hoc Committee Chairperson, following a decision of the Committee wrote to Minister
- Briefing is being presented in response with the approval of the Minister

Background to the Briefing

- Study was being conducted in response to arguments presented during Public Hearings
- Aim is to see what is substantively correct, incorrect or points to other practices not highlighted during Public Hearings
- More than 86 countries already have Right to Information laws
- Five in Africa are about to legislate on this matter
- Overview reflects on this but only a few case studies would be focused upon for brevity and clarity of message



What is classified?

- Various dispensation classify different things that are associated with the generation, development, storage, transfer, copying, conveying, protecting, processing, and using information.
- The main approaches are:
 - **Narrow definition** of national security
 - **Broad definition** of national security
 - **Third way:** broad definition of national security but limited role of intelligence and security structures whilst bringing non-traditional bodies to assist with the management of national security matters

Why is it classified?

"In every country there is a legitimate public interest in providing a higher level of protection to sensitive information held by public bodies. Inevitably such protection constitutes a restriction on the right of access to information. The protected public interests are enacted as exceptions in the FOI [Freedom of Information] regimes and even if the lists of such exceptions to the 'right to know' may vary, but there are some core elements, such as national security, defence, foreign relations, public safety, public order which are always present".



Why is it classified?

The widely accepted grounds for classification include:

- *Protection of interests of the country;*
- *Public interest;*
- *State interest;*
- *Vital interest;*
- *Permanent interest;*
- *Fundamental interests;*
- *Interests of importance;*
- *state interests; and*
- *essential interests.*

Why is it classified?

"These interests are enlisted both in international... and national legal instruments which provide for the freedom of information and expression. The essence of every secrecy law is that some sets of information have to be protected in the interest of the public/country/nation so as to avoid threats or harms which would be caused by disclosure to unauthorized persons..."

Who classifies?

There are **three main systems** that deal with the classification of information:

- **Prior Classification System:** *the classifying authority determines beforehand categories of information to be classified based on a harm test or on a public interest test*
- **Originator Classification System:** *the originator or author of the document does the classification of information. In some dispensations, this classification needs to be confirmed or rejected by a senior person or the classifying authority; USA.*
- **Classifying Authority System:** *only the classifying authority classifies documents but whether the document has a classification on it or not*

When is it classified?

Different systems adopt different approaches to this issue:

- **Classification Default System:** Some consider all information as classified until it is requested and then the harm or public interest tests are applied and then given or refused (*From creation until declassified*)
- **Multiple-layer Dispensation:** Some dispensation designate categories of information that may, must or must not be refused (*At the point of determining content and its relation to the applicable test(s)*)

The need to protect must be proven in all systems

Where is it classified?

In all the systems, the information is classified at the venue of its creation or receipt

- In the foreign countries or in regions for field agents;
- In the battle field for defence intelligence agents;
- In crime syndicates, in the case of crime intelligence agents; and
- In international organisations (SADC Organ, CISSA, Bilateral Relations and at the AU) where there is transnational collaboration of state parties.

How is it classified?

There are areas that inform the process of classification:

- **International law and jurisprudence;**
 - *Grounds for limitation must be met*
- **Constitutional Provisions;**
- **National Laws and subordinate legislation**
- **Supportive activities and documents**
 - *Training and Advisory Services*
 - *Security Audits*
 - *Manuals*

How is it classified?

International Law provides that:

- **Restrictions must be prescribed by law**
 - *Clearly*
 - *Precisely*
- Meet the test of legal certainty and foresee-ability
- Must be genuinely directed towards achieving one of the legitimate aims specified in the treaties
- Must be necessary in a democratic society
 - *Social need*
 - *Proportionate*

How is it classified?

There are areas that inform the process of classification:

- **International law and jurisprudence;**
 - *Grounds for limitation must be met*
- **Constitutional Provisions;**
 - *National principles must be adhered to; eg, secrecy is in the Constitution in Austria RTI in RSA*
- **National Laws and subordinate legislation**
 - *Set out basis for limitation*
- **Supportive activities and documents**
 - *Training and Advisory Services*
 - *Security Audits*
 - *Manuals*

How is it classified?

International Instruments:

- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- African Charter on Human and People's Rights
- American Convention on Human Rights and American Declaration of the Rights and Duties of Man
- European Convention on Human Rights

How is it classified?

Tests that are used for information that needs to be (de)classified:

– Harm test

- Two main aspects: gravity and probability as a result of unauthorised disclosure but not all dispensations apply these two tests
- Justification of the reason for non-disclosure
- Rare cases involve cannot confirm or deny response to requests

How is it classified?

Public interest test: serious concern or benefit

- Does not mean of interest to the public but in the interest of the public
- Arises when access to information is required
- Weigh for and against factors for disclosure
- Provide justification for decision

How is it classified?

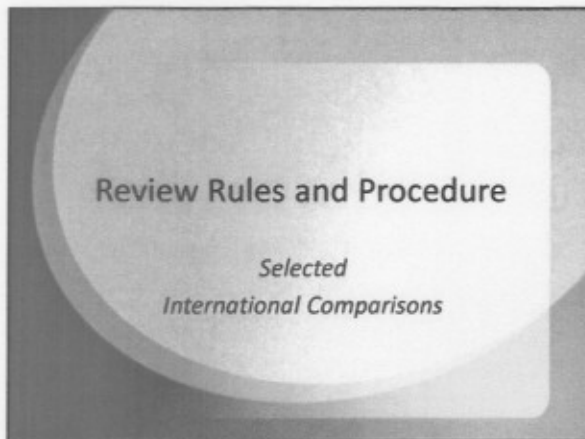
Matters of general public interest:

- Information about activities and possible wrongdoing of the security services (spycatcher)
- Matters, including the status of settlement negotiations, concerning the health risks of legal drugs and the locus of legal and moral responsibility for resulting injuries (The Sunday Times)
- Criticism of the police department (Thorgeirson)
- Published opinion alleging a court's lack of impartiality (Barford)

How is it classified?

RSA Constitutional Provision on limitation

- Law of general application
- Must be reasonable and justifiable in an open and democratic society
- Based on human dignity, equality and freedom
- Take into account relevant factors such as:
 - *The nature of the right;*
 - *The importance of the purpose of the limitation;*
 - *The nature and extent of the limitation;*
 - *The relation between the limitation and its purpose; and*
 - *The less restrictive means to achieve the purpose. (Sect 36 Const)*



Review Systems Elements

- Regular reviews
- Random Checks
- Self-tasking review
- Review on request

Review Outcomes

- Classification level and period of classification may be maintained
- Classification level and period of classification may be reduced
- Information may be classified at a higher level and or the period extended
- The information may be declassified

Post Review Obligations

The originator of the information must following a review:

- Notify all holders of the said information on the outcome of the review

Review Time-frames

- Classification is a restriction of the right of access to information and must be limited to avoid emptying the right
 - *Time lapse*
 - *Probability and gravity of harm lessened*
- Different dispensations have different time frames
- The sensitivity of the information is directly related to the time frame for it being protected
- What follows are selected examples of countries and their applicable review time-frames

Review Time-frames

- Longest time-frame is 95 years: Lithuania;
- 90 years in Hungary;
- 70 years in Sweden;
- 50 years in Estonia and Poland;
- 30 years in maximum of 60 years in Germany;
- 12 years extendedable in Mexico;
- 05 years for "Top Secret";
- 04 years for "Secret";
- 03 years for "Confidential";
- 02 years for "Restricted".

Review Time-frames

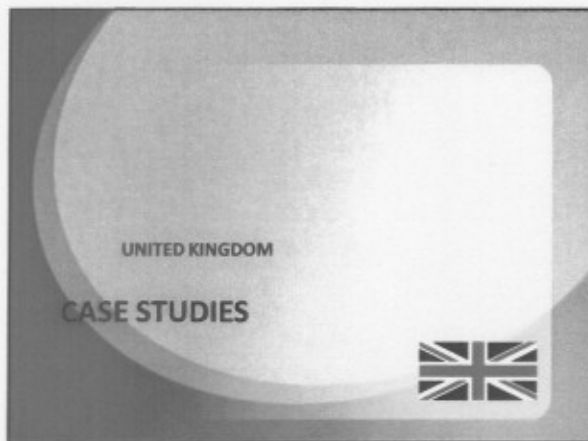
Information protected forever:

- Data identifying the civilian and military state security services staff engaged in operational surveillance tasks;
- Data identifying those who assisted the state bodies or services and institutions authorised to carry out operational surveillance tasks in the execution thereof; and
- Classified information obtained from other states or international organisations which has been supplied subject to condition.

Types of Access

Access is dependent on personnel security (vetting), need-to-know and originator control:

- *Full access: Top Secret*
- *Partial Access: Secret/Confidential/Restricted*
- *Conditional Access: Request for information*



United Kingdom

- No adequate safeguards to protect against the misuse of exemptions by government
- No balance between national security and freedom of expression is properly struck
- Prohibition of the disclosure of a huge range of information by government employees and the media
- Imprisonment and fines for the violators of OSA



United Kingdom

- OSA: punishes intention and actual damage to national security – harm needs not be actual
- Public interest defence is not provided for in OSA any more
- Recipients and publishers of information were not protected under UK law
- A whistleblowers Act has now been enacted in the UK



United Kingdom

Mechanisms for enforcing the provisions of the UK laws are:

- Injunctions
- Production orders
- Confidentiality clauses
- Contempt of court laws
- Search and seizure powers
- No protection of sources of journalists



United Kingdom

- **How is it classified?**
 - Guided by legislative provisions
 - Official Secrets Act (OSA) 1911-1989
 - Data Protection Act (DPA) 1998
 - Freedom of Information Act (FOIA) 2000



United Kingdom

- **How is it classified?**
 - **HMG Security Policy Framework (SPF)**
 - Creation, storage, transmission and destruction
 - Prime Minister and Cabinet have the overall security responsibility
 - Delegated to Heads of Department
 - However, security is the responsibility of everyone
 - Protection focus is on the protection of “government assets”



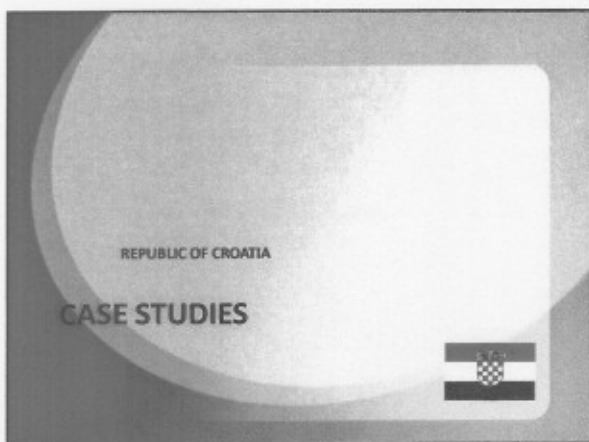
United Kingdom

- **Four tiers of the SPF:**
 - SECURITY is a business enabler making government work better, safer and more confidently – not just a support function
 - Five Core Security Principles highlight accountability at senior levels, collective responsibility of all staff and contractors, and the need to employ trustworthy people
 - Concise key security policy documents: minimum standards
 - Management of department specific risks over and above the baseline

United Kingdom

- **How is it classified?**
- HMG Security Policy Framework (SPF)
 - **7 Security Policies**
 - Governance, Risk Management and Compliance
 - Protective Marking and Asset Control
 - Personnel Security
 - Information Security and Assurance
 - Physical Security
 - Counter-Terrorism
 - Business Continuity





Croatia

What is classified?

- National security and vital interests of Croatia
- Structure of the state as laid down in the Constitution
- Independence, integrity and security of Croatia
- International relations of Croatia
- Defence capability and security intelligence system

Croatia

- Public security
- Basis of the economic and financial system of Croatia
- Scientific discoveries, inventions and technologies that are of great significance for national security of Croatia

Croatia

Scope of protection:

- Defence;
- Security intelligence system;
- Foreign affairs;
- Public security;
- Criminal proceedings and science, technology, public finances and economy that impact on security interest



Croatia

Who classifies?

- The originator determines the lowest degree of secrecy that will secure the interests
- Top Secret and Secret may be done by the Presidents of Croatia, Parliament, Government of Croatia;
- Chief State Attorney, Head of the General Staff of the Armed Forces, Heads of authorities of the security intelligence system
- Those that are delegated by the above in writing within their scope of work

Croatia

- Confidential and Restricted may be done by the above mentioned people and the Heads of other state authorities
- All the above are also empowered to classify information for scientific institutions, bureaus and other legal persons when working on projects, discoveries, technologies and other jobs of security interest to Croatia



Croatia

When is it classified?

- At the point of creation of information by the originator (receiver of information)
- Certain sensitivities are determined by designated state authorities in both the public and private sphere where it impacts on national security



Croatia

Why is it classified?

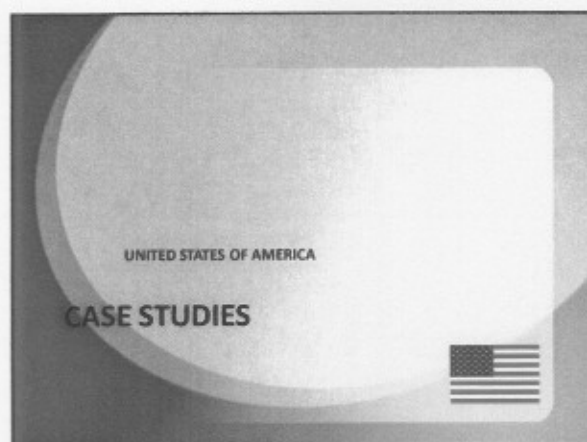
- To secure national security and vital interests of the Republic of Croatia
- Details of the threats to national security are listed as information that needs to be protected



Croatia

How is it classified?

- Harm test is applied: *lowest degree of secrecy needed to protect the interests*
- Need-to-know
- Personnel Security a prerequisite to access
- Oversight done by the office of National Security Council



USA

Why is it classified?

- Certain information needs to be kept in confidence for national defense purposes in order to:
 - Protect citizens
 - Democratic institutions
 - Homeland security, and
 - Interactions with foreign nations



USA

What is classified?

- Information that could lead to identifiable or describable damage to national security pertaining to:
 - Military plans, weapons systems, or operations;
 - Foreign government information;
 - Intelligence activities (including covert action), intelligence sources or methods, or cryptology;



USA

- Foreign relations or foreign activities of the US, including confidential sources;
- Scientific, technological or economic matters relating to national security
- United States Government programmes for safeguarding nuclear materials or facilities;
- Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to national security; or
- The development, production, or use of weapons of mass destruction.

USA

Who classifies?

- The originator of information: minimum security classification
- Classification authority
 - *President, Vice-President; agency heads and officials designated by the President;*
 - *US government officials delegated to classify*
 - Delegation is limited to the minimum required to implement the Order
 - Delegated officials must show a demonstrable and continued need to classify

USA

Where is it classified?

- *Point of creation or receipt of information*
- *Point of review of the classified information*

When is it classified?

- *At the point of creation or receipt*



USA

How is it classified?

Two classification processes:


- Original Classification Authority
 - *Limited number of persons*
- Derivative Classification Authority
 - *Classifies as a result of extracting from classified information;*
 - Must observe and respect original classification decisions
 - *Directed by a classification guide*

Stringent classification orders must be adhered to

USA


Classification review

- Systematic review
- Mandatory Review



CANADA

CASE STUDIES



Canada

What is classified (safeguarded)?

- Information received in confidence from:
 - A government of a foreign state or an institution thereof;
 - An international organisation of states or an institution thereof;
 - The government of a province or an institution thereof;
 - Municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or
 - An aboriginal government.
- The above may be disclosed with the approval of the relevant authorities or if the authorities may the information public

Canada

- Past and current confidential sources of information, intelligence or assistance to the Government of Canada
- Places, persons, groups or entities that were, are or are intended to be, targets of covert collection efforts by the Government
- The identity of any person engaged in such covert collection activities
- Plans for certain military operations
- The means the Government uses to protect information, including encryption and any vulnerabilities
- Similar information to the above that relates to or is received from foreign entities or terrorist groups

Backgrounder No 12 – Security of Information Act

Canada

Information whose disclosure could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs:

- *Federal-provincial consultations or deliberations, or*
- *On a strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs*

Info that could be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

Canada

- Military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with detection, prevention or suppression of subversive or hostile activities;
- Relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;
- Relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organisation or person responsible for the detection, prevention or suppression of subversive or hostile activities;

Canada

Obtained or prepared for the purpose of intelligence relating to:

*The defence of Canada or any state allied or associated with Canada, or
The detection, prevention or suppression of subversive or hostile activities;*

Obtained or prepared for the purpose of intelligence respecting foreign states, international organisations of states or citizens of foreign states used by Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

Canada

- On methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in para (d) or (e) or on sources of such information;
- On the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organisations of states for the purpose of present or future international negotiations;
- That constitutes diplomatic correspondence exchanged with foreign states or international organisations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad;
- Relating to the communications or cryptographic systems of Canada or foreign states used
 - For the conduct of international affairs;
 - For the defence of Canada or any state allied or associated with Canada, or
 - In relation to the detection, prevention or suppression of subversive or hostile activities.

Canada

"Subversive or hostile activities" means:

- Espionage against Canada or any state allied or associated with Canada,
- Sabotage,
- Activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or a foreign state,
- Activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,
- Activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and
- Activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.

Canada

Why is it classified?

To avoid injury to:

- Federal-Provincial relations;
- international affairs and defence inclusive of intelligence;
- law enforcement operations and on-going investigations;
- Advance security (prevent crime);
- policing services for provinces or municipalities;
- Integrity of work done by offices similar to RSA Chapter 9 institutions;
- Safety of individuals;
- Economic interests of Canada;
- Economic interests of certain government institutions;
- Personal information;
- Third Party information

Canada

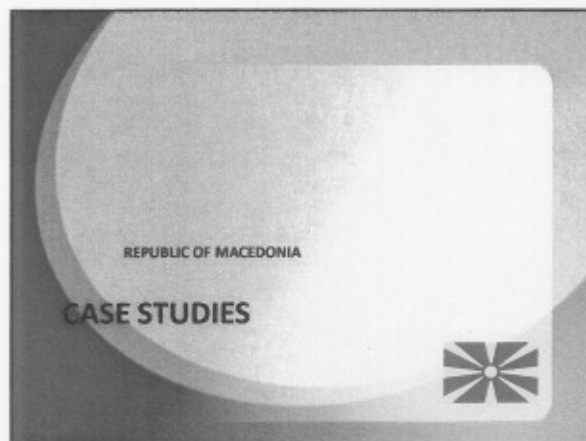
• Public Interest Defence:

"15. (1) No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest".

• Public interest defence conditions are:

- Disclosing an offence under an Act of Parliament
- Public interest in the disclosure outweighs the public interest in non-disclosure

• Sections 13 and 14 is applicable only to persons permanently bound to secrecy and so too is the defence



Macedonia

What is classified?

- Information pertaining to:
 - Public security;
 - defense;
 - foreign affairs;
 - security, intelligence and counter-intelligence activities of the organs of the state government of the Republic of Macedonia;
 - systems, appliances, projects and plans of importance to the public security, defense, foreign affairs;
 - scientific, research and technological, economic and financial affairs of importance to the Republic of Macedonia

Macedonia

Who classifies?

- "State Secret" is assigned by the President of Macedonia, president of the Parliament, President of the Government of the Republic of Macedonia, president of the Constitutional Court, president of the Supreme Court, the ministers within the scope of operation of their ministries, the public prosecutor, the Chief of headquarters of the army, the director of the Intelligence Agency, director of the Directorate for security of classified information, as well as empowered persons with written consent by them.
- Persons empowered by law, international agreements or other regulations shall also assign classified information as state secret.

Macedonia

When is it classified?

- At the point of creation
- Upgraded at the point of designation as a "State Secret" by the empowered persons
- Reclassified by the creator or a successor to the creator or another person (supervisor)

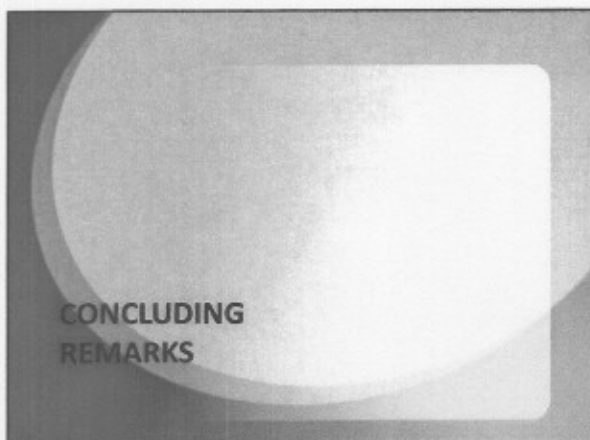


Macedonia

Where is it classified?

- Inside and Outside Macedonia subject to the provision of the Macedonian Law on the exchange of classified information





Concluding Remarks

- Each country is informed by its own history, evolution, political culture and constitutional dispensation
 - *To exceptionalise phenomenon makes you stop learning*
- Different traditions may, sometimes, provide continuities and discontinuities
- Part 1 of the briefing provided a background and an overview of the different systems and the tendencies that obtain when a helicopter vision is adopted

Concluding Remarks

- Part 2 dealt with today focused on:
 - *UK*
 - *Croatia*
 - *USA*
 - *Canada*
 - *Macedonia*
- References to African countries were dealt with in passing as more of them have not been finalised

Concluding Remarks

- During the question and answer session some details may be provided on some of the BRIC countries as was requested on 15 Feb 2011
- The Ad-Hoc Committee is advised to consider the entire business process in finalising the legislation
 - *From conception to destruction*
- Make clear and precise choices of how the entire system must operate: chopping and changing would create serious operational problems