

Jurisdiction Determination : *The Critical Importance of Getting it Right*

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Jurisdiction Determination

- What is Jurisdiction Determination?
- Key Concepts & Pitfalls
- How does an Item end up on the U.S. Munitions List (USML)?
- Can an item be subject to the International Traffic in Arms Regulations (ITAR) but not described in the body of the USML?
- The U.S. Munitions List
- Jurisdiction Determination Process

What is Jurisdiction Determination?

- The first question to answer in export controls
- The *process of determining the controlling U.S. government agency* for exports of commodities, technical data or software
- End result will identify that the item is under the jurisdiction of either the:



- U.S. International Traffic in Arms Regulations (ITAR) or



- U.S. Export Administration Regulations (EAR)

- In certain limited instances, another U.S. government agency may ultimately have export jurisdiction over an item (e.g. Nuclear Regulatory Commission (NRC)/Dept. of Energy (DoE) for certain nuclear items)



Jurisdiction Determination: The Process

- The process of Jurisdiction Determination should normally be triggered by one of the following activities:
 - Initiation of design/development of an item, e.g. when you respond to a customer RFP or when you otherwise modify an existing item to create a new one
 - Acquisition of an item (incl. software and technology) from a third-party
 - Request for Export Classification triggered by the originator of an export transaction
 - Manual Shipment request
 - Technical Data Release request



Key Concepts & Pitfalls

- You must start with determining if the item meets any criteria in ITAR 120.3
 - Was the item designed or modified (tweaked) for military application?
- The U.S. Department of State is the ultimate authority in determining jurisdiction under the ITAR
 - Commodity Jurisdiction requests should be directed to the State Department - not the Commerce Department

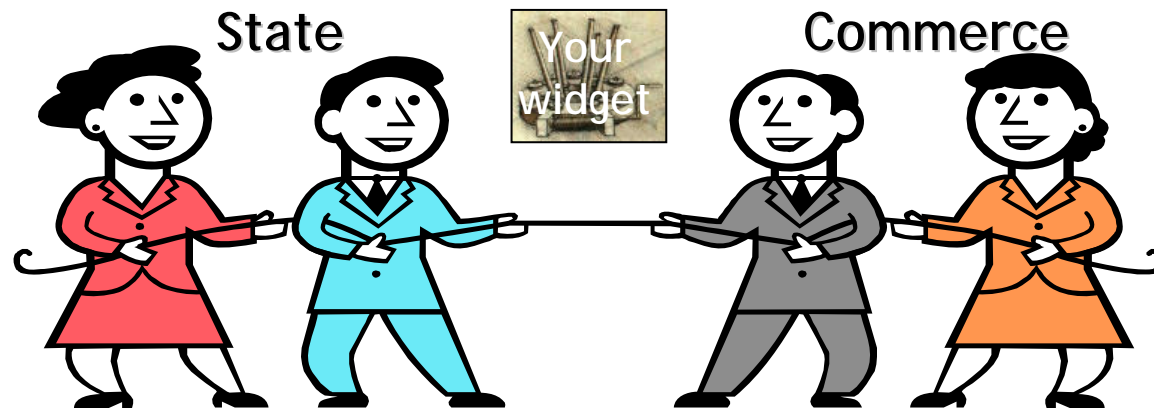


Beware!

The ITAR controls some items that have commercial applications and State may take jurisdiction over an item even though it is specifically called out on the U.S. Commerce Control List (CCL)

Key Concepts & Pitfalls

- An item CANNOT fall under the jurisdiction of both the ITAR and EAR!



Beware!
State and Commerce occasionally make conflicting claims of jurisdiction

- U.S.-origin parts/assemblies/sub-assemblies for non-US military systems may fall under ITAR jurisdiction
 - *“Military application” under the ITAR is not limited to US military applications in making jurisdiction determinations*
- State retains great discretion to designate a defense article or service

How does an item end up on the USML ?



ITAR Sec. 120.3

- An article or service may be designated or determined in the future to be a defense article or defense service if it:
 - Is specifically designed, developed, configured, adapted, or modified for a military application, and
 - Does not have predominant civil applications, and
 - Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or
 - Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under the ITAR is necessary

How does an item end up on the USML? (cont'd)

- The intended end use is highly relevant in determining the *original design intent*, and that is highly relevant in determining jurisdiction
- If an item is subject to the ITAR, it remains subject to the ITAR regardless of the intended use of the article or service in a given shipment after its export (i.e., even for a civilian purpose)

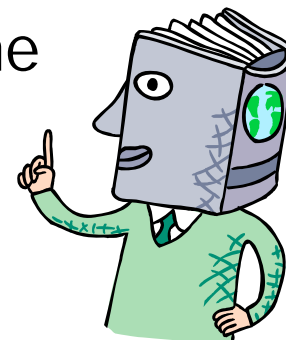


How does an item end up on the USML? (cont'd)

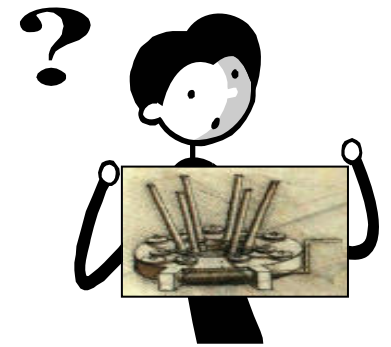
- The ITAR indicate that the scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778)
 - However, the unwritten rule is that this provision is ignored by State...

■ An item is subject to the ITAR even if it meets the standards of Section 120.3 and is not actually described in the body or text of the USML

- Conversely, items that are described on the USML are subject to the ITAR even if they do not meet the standards of Section 120.3



When must I submit a Commodity Jurisdiction (“CJ”) request?



ITAR Sec. 120.4

- The CJ process “is used” when “doubt exists” as to whether the USML (or ITAR Sec. 120.3) covers an item
- You must submit a CJ if the item
 - was specifically designed, developed, configured, adapted, or modified for a military application, or
 - It may be described in the body of the USML, and
 - you cannot otherwise determine the State Department has jurisdiction

When must I submit a CJ request? Cont'd

ITAR Sec. 120.4

- In deciding whether it must submit a CJ, the exporter should ordinarily ignore “predominant civil applications” and “performance equivalent (defined by form, fit and function)”
 - Such factors are relevant considerations for State and a discussion of these factors should be in the CJ request
 - While these factors are relevant to the final decision by State, these factors are not relevant in determining whether “**doubt exists**” for the exporter



When must I submit a CJ request? Cont'd

ITAR Sec. 120.4, cont'd

- Remember that “modified” is broadly defined to include a mere **tweak**
- State will not give explicit advice on just when or whether a CJ request is required
 - However, State reserves the right to make its own decision retroactive (it typically is retroactive), and
 - If you do not seek a CJ for your product a competitor or an enforcement agency may do so - although State has said its practice is to only issue CJ's to the original manufacturer



Sample Decision Flow

ITAR Sec. 120.3

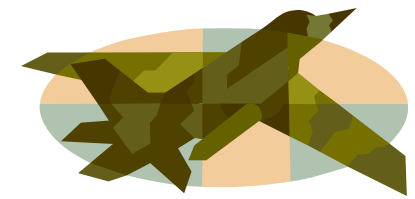
- Is the item designed. . .configured. . .OR MODIFIED?

- “modified” means tweaked or more

Example: DDTTC says that slight changes to the diameters of cooling holes in a commercial jet engine at the request of a military buyer means the engine is “modified” for military application

- If NO, the item is not subject to the ITAR
- If YES, either:
 - Submit a CJ request and wait for a DDTTC decision,
 - Treat the item as ITAR controlled and submit license applications before each export or release to a foreign person, or
 - Determine DDTTC has concluded the item is not subject to the ITAR

The United States Munitions List



I - Firearms

II - Artillery Projectors



III - Ammunition

IV - Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs & Mines

V - Explosives, Propellants, Incendiary Agents and their Constituents

VI - Vessels of War and Special Naval Equipment

VII - Tanks and Military Vehicles

VIII - Aircraft and Associated Equipment

IX - Military Training Equipment

X - Protective Personnel Equipment & Shelters

XI - Military Electronics



XII - Fire Control, Range Finder, Optical and Guidance and Control Equipment

XIII - Auxiliary Military Equipment

XIV - Toxicological Agents, including Chemical Agents, Biological Agents and associate Equipment

XV - Space Systems and Associated Equipment

XVI - Nuclear Weapons Design and Test Equipment

XVII - Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated

XVIII - Directed Energy Weapons

XIX - Reserved

XX - Submersible Vessels, Oceanographic and Associated Equipment

XXI - Miscellaneous Articles



Jurisdiction Determination Process

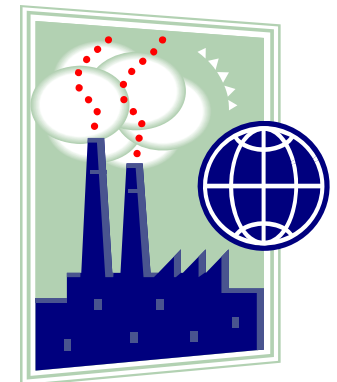
- DOCUMENT A DETAILED DESCRIPTION OF THE ITEM (PRODUCT OR TECHNOLOGY)
 - Is there a product specification sheet?
 - Are there engineering drawings?
 - Are there web site links?



Jurisdiction Determination Process, Cont'd

- ORIGINAL/INITIAL ITEM DESIGN INTENT
 - Was the item originally developed for a military/defense application?
 - Was the underlying technology for the item originally developed for a military/defense application?
 - Was the item originally developed for a governmental application?
 - Was the item originally developed for a commercial/industrial application?

ORIGINAL
DESIGN
INTENT



Jurisdiction Determination Process, Cont'd

- INTENDED MARKET (END USE) AT TIME OF INITIAL DESIGN
 - Military/defense?
 - Commercial/industrial?
 - If both, what is the breakdown by % ?
- WAS THE ITEM (PRODUCT OR TECHNOLOGY) DESIGNED OR TESTED...
 - To military/defense customer's specifications?
 - For intelligence gathering?

ORIGINAL
DESIGN
INTENT

*John, why oh why
didn't you
document
Original Design
Intent!*



Jurisdiction Determination Process, Cont'd

Funding of the Design

- U.S. DEPARTMENT OF DEFENSE OR FOREIGN GOVERNMENT DEFENSE FORCE FUNDING

- Has any of the funding for development or manufacturing of the item come from...



- U.S. Department of Defense?

- Other U.S. government agencies?

- Foreign defense forces or governmental entities?



- Note: Especially look for non-recurring engineering charges (NRE) and whether the customer provided or controlled the design specification

Jurisdiction Determination Process, Cont'd

- WHAT IS THE CURRENT/FUTURE INTENDED MARKETING/END-USE OF THE ITEM?

- Military/defense?



- Space?

- Aircraft (military)?

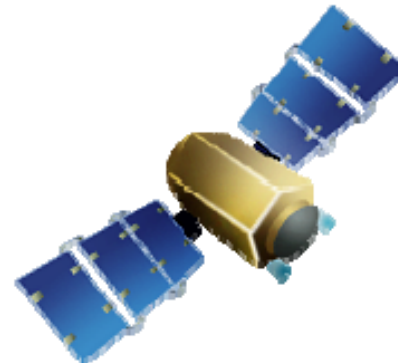


- Aircraft (commercial)?

- Intelligence gathering?

- Telecommunications?

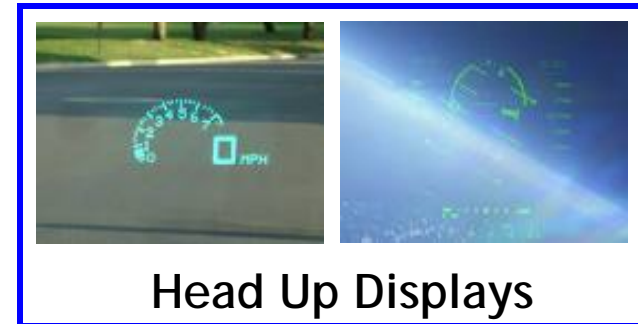
- Other?



Jurisdiction Determination Process, Cont'd

- DOES THE SPECIFIC ITEM (*think part number!*) HAVE PREDOMINANT CIVIL (COMMERCIAL) APPLICATIONS?
 - If this specific item has predominant civil applications, was it MODIFIED in any way (in terms of form, fit or function) from a military version of the product for the commercial market?
 - Was the item originally designed for commercial market applications?

Unique Part Numbers



Jurisdiction Determination Process, Cont'd

- IF THE ITEM WAS ORIGINALLY DESIGNED FOR COMMERCIAL MARKET APPLICATIONS, HAS IT BEEN MODIFIED (TWEAKED) IN ANY WAY FOR MILITARY USE?
 - IF So, what was the modification?
 - Was the FORM altered?
 - Was the FIT altered?
 - Was the FUNCTION altered?
 - How is the modified version distinguished from the commercial version?
 - Is it by Part number?

Tweak in ANY way



Shared parts & components?

Jurisdiction Determination Process, Cont'd

- IF THE ITEM HAS BEEN DESIGNED AND USED FOR MILITARY APPLICATIONS...
 - Does it have a performance equivalent (defined by Form, Fit and Function) to an IDENTICAL item (THINK PART NUMBER!) in use in the commercial market? OR
 - Can the item be used with its' SAME Form, Fit AND Function (THINK PART NUMBER!) for commercial market applications?
- DOES THE ITEM HAVE MORE THAN ONE USE? (If so, describe)

Supporting Information on a CJ request



Run Flat Tires

Jurisdiction Determination Process, Cont'd

- DOES THE PRODUCT CONTAIN ANY PARTS, COMPONENTS, ASSEMBLIES, THAT WERE SPECIFICALLY DESIGNED, DEVELOPED, CONFIGURED, ADAPTED OR MODIFIED FOR AN AEROSPACE OR MILITARY APPLICATION?

IF "YES"



See-through Rule!

Incorporation of an ITAR controlled item in a commercial item does NOT end ITAR controls

- A separate jurisdiction determination analysis must be performed for each item
- Are any of such parts, components, assemblies "embedded" in the product in such a way that they are not easily removable/replaceable (i.e. not "line replaceable" parts)?

Jurisdiction Determination Process, Cont'd

- Simply put, under the ITAR, a part, component, subsystem, or software remains subject to the ITAR even after it is incorporated or merged into another item
- This is not consistent with business concepts such as inventory management, issuance of unique product IDs, or substantial transformation
- For these reasons, it is important to train company personnel regarding the differences between the State Department approach and all business approaches

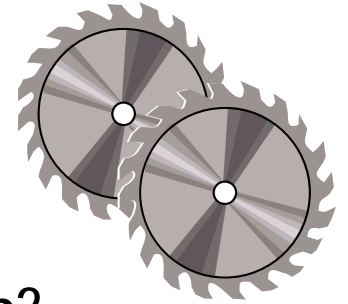
ITAR parts remain subject to the ITAR after incorporated into a different item



Jurisdiction Determination Process, Cont'd

■ ITEM PART NUMBER

- Is the part number unique to the customer?
- Is the part number unique to the application?
- Is the part number unique to military or commercial application(s)?



■ EXISTING CLASSIFICATION INFORMATION

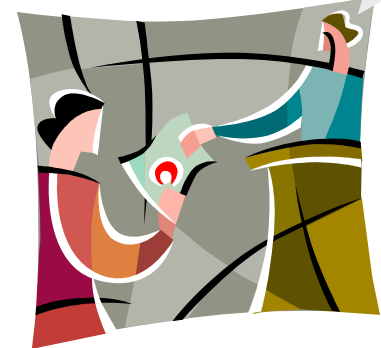
- What is the current classification (if any)?
- ECCN or USML Category (if previously classified)?
- Schedule B/Harmonized System (HS) Code?

Jurisdiction Determination Process, Cont'd

- Although an item used in a military application may ultimately function in precisely the same way as its commercial counterpart, that does not mean that the State Department will cede jurisdiction over the item

Importance of jurisdiction rationale

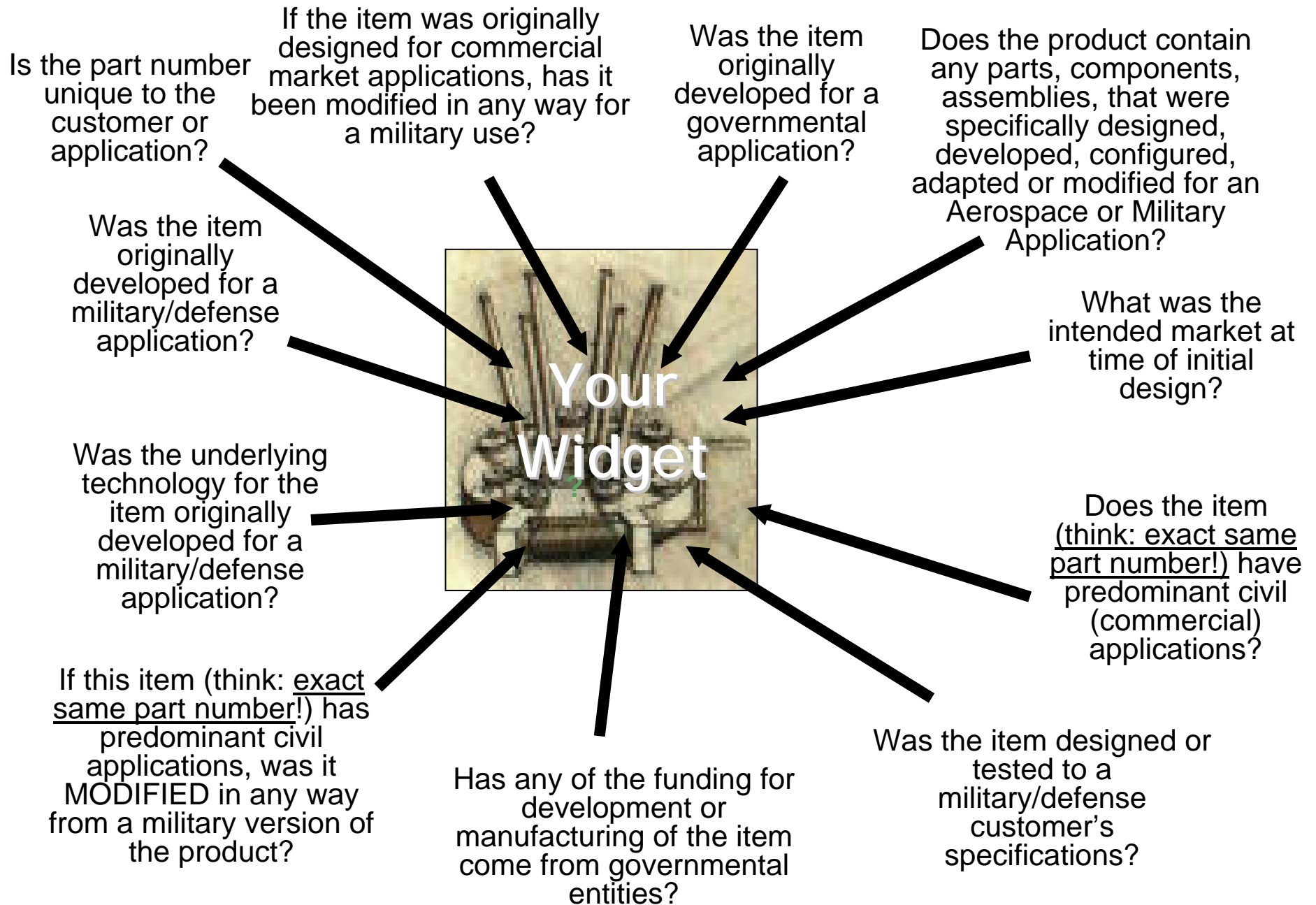
- A Commodity Jurisdiction ("CJ") request may be required



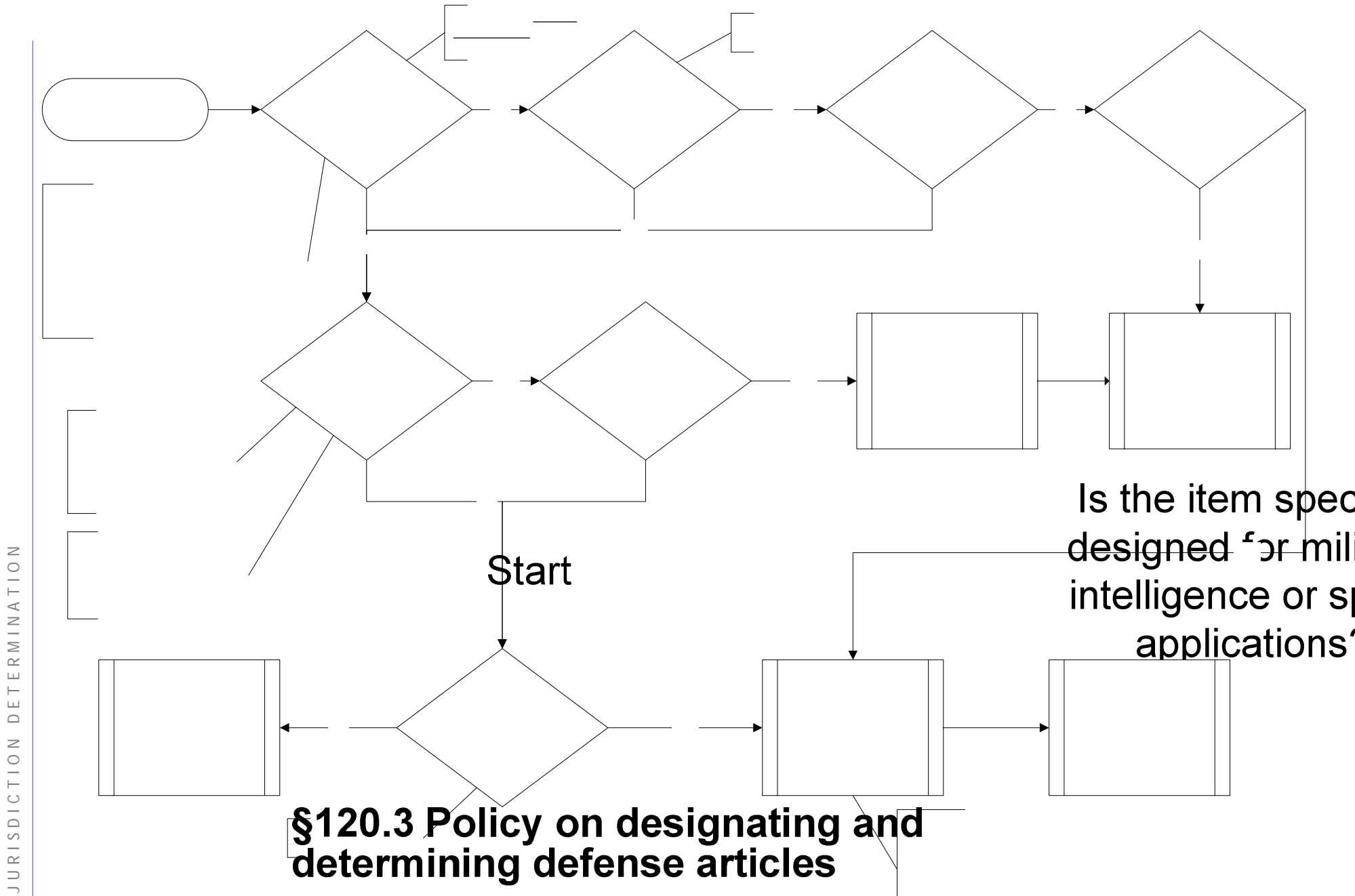
Sorry...its STILL ITAR!

- Your compliance function should always confirm jurisdiction determination
 - If doubts as to exact jurisdiction exist, you must submit a CJ request to State before exporting any product under the EAR as a commercial item
 - Document rationale for each jurisdiction determination

Jurisdiction Determination Analysis Diagram



Jurisdiction Analysis Decision Tree



Strategies for developing substantiated jurisdiction determinations

- Learn the configuration management system, the system for assigning unique numbers such as SKUs, material numbers, part numbers, etc.
- Learn the software systems for creation (CAD) and storage of designs
- The configuration management system and design software systems create:
 - **Risks** - for example, is it impossible to separately store a part design modified for military application?
 - **Opportunities** - for example, can the systems document that a later version was based upon an older commercial part rather than a more recent military part?



Hypothetical Scenario #1

- Part number 10A347 seal and coupling for pneumatic anti-ice and ECS systems
 - Designed for a military application
 - housing with nominal ID of 2.25 inches and a length of 2.5 inches in order to fit onto an F-15 aircraft
 - All subsequent part numbers (e.g. 10A347-200-125) would be under the jurisdiction of the Department of State by default because they were based on the same basic technology (only change is the diameter and length of the housing)
- A Commodity Jurisdiction request could be sent to the Department of State
 - Requesting the removal of all subsequent couplings from the USML if they are for commercial applications
 - ITAR Section 120.4 outlines the major factors in a CJ determination

Hypothetical Scenario #2

- Part number 10A357 seal and coupling for pneumatic anti-ice and ECS systems
 - Designed for a commercial application
 - Housing with nominal ID of 2.5 inches, length of 2.75 inches made for a Boeing 737 aircraft.
 - All subsequent part numbers (e.g. 10A357-200-125) would be under the jurisdiction of the Department of Commerce unless they were specifically modified for a military application
- Example, any iteration of the 10A357 specific to a military application
 - That part number (e.g. 10A357-010-015) would be controlled on the USML
 - The next iteration of the 10A357, would remain under the jurisdiction of the Department of Commerce because it was based on the same technology as the original, which was designed for the Boeing 737
 - Note: Only if the subsequent part was designed based off of the specific part number for a military application would it result in an item controlled on the USML

Jurisdictional Determinations - Practical Application

- You are a US manufacturer of common butterfly valves
- These valves are used for a wide range of industrial applications



You are approached by a military buyer who wants one of your products with only a few minor changes for safety considerations

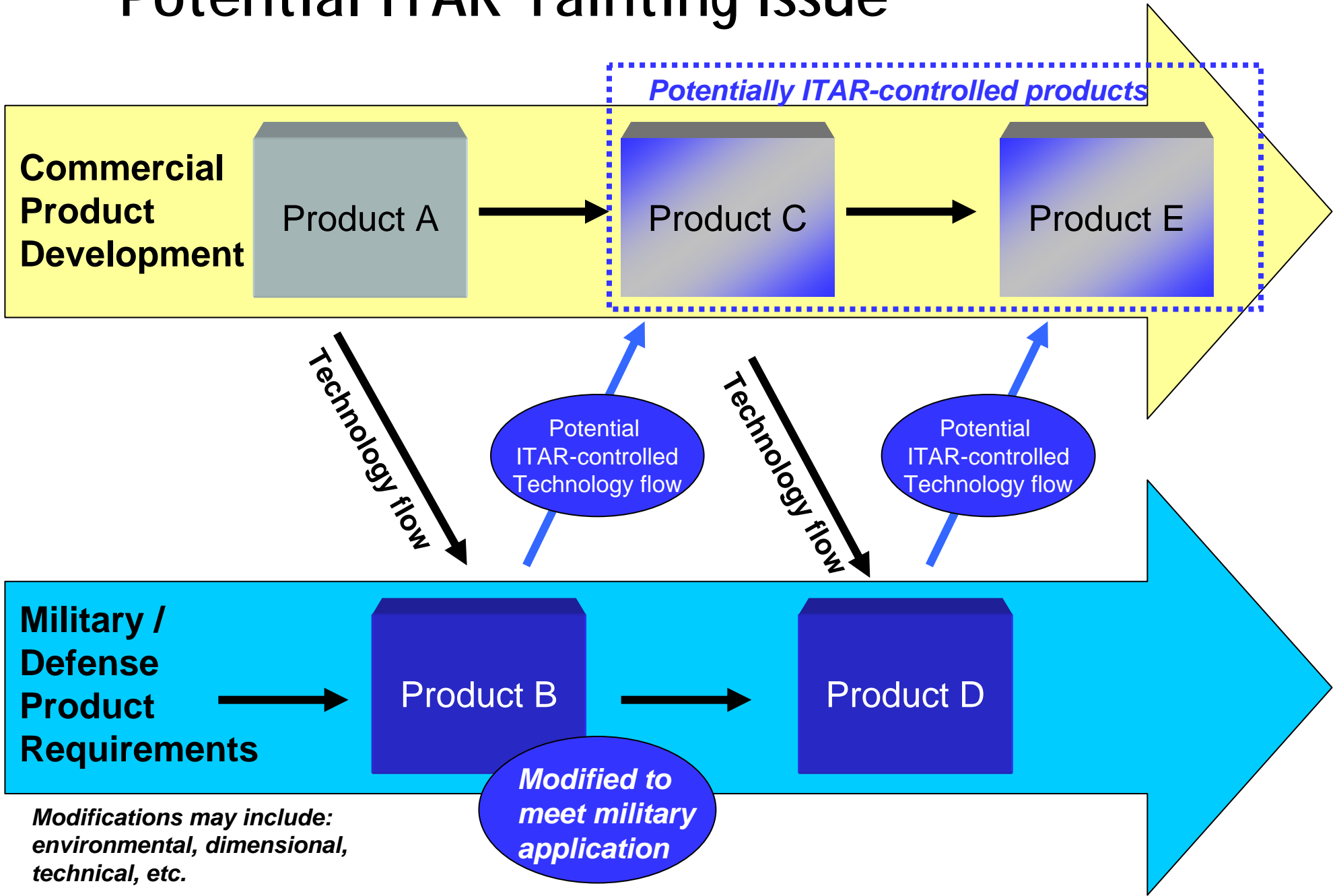
Jurisdictional Determinations - Practical Application, Cont'd

- The buyer does not want to make any modifications whatsoever to the Pressure Rating and Temperature Range
- However, the customer decides to only make small changes to the upper shaft stem

1. What are the differences between the two items?
2. Is either one under State Department jurisdiction?
3. Are the two different items the same in form, fit and function?



Product Development Chronology - Potential ITAR Tainting Issue



“Essentially the same” does NOT mean “Exactly the same”

- Take the “*form, fit and function*” language of the ITAR very seriously
 - Making the slightest tweak for the sake of meeting the demands of an ITAR-controlled end application can trigger ITAR control on the item being supplied, e.g.
 - Moving a mounting hole
 - Changing a bracket or connector
 - Altering the physical shape of the device
 - Testing to a set of application-specific performance parameters



DOS and DOD Advice when filing CJ's

- Provide sales market breakdown by \$ value and %
- Is the modification specifically “military”, or was it requested by the military, but actually for both commercial and military application?
- “Predominant use” is a subjective term... but DDTC knows it when they see it!
- **Don't mislead!**
- Look at competitors! What are their products?
- Factors DOD looks at:
 - How lists were developed and scoped
 - Precedence
 - Performance equivalence to commercial use
 - Capability (potential military application)



Thank You!

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