1958,[155] the Declaration of Legal Principles is the one unambiguous lawmaking declaration on space.[156] The Declaration of Legal Principles was promulgated by the LSC of UNCOPUOS, which was established as a subsidiary organ of the United Nations.[157] Unlike other General Assembly resolutions, those specifically addressed to subsidiary organs, such as UNCOPUOS, are legally binding.[158] Since the Declaration of Legal Principles was specifically addressed to UNCOPUOS, a subsidiary organ of the general assembly,[159] the resolution is legally binding and establishes law. In fact, it is generally accepted and undisputed that the Declaration of Legal Principles is not only legally binding but its principles are considered customary international law.[160] This view is premised on the belief that States have consistently adhered to the general principles set forth in the Declaration of Legal of Principles.[161]

The Declaration of Legal Principles was the first binding international space law instrument and the principles they contain are the basis of the Outer Space Treaty. The incorporation of the legally binding principles within the Outer Space Treaty illustrates the State Parties intent to establish the treaty as a law-making treaty. Recalling the Declaration of Legal Principles in the Preamble of the Outer Space Treaty is additional evidence that the State Parties intended for the Outer Space Treaty to establish space law.

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[155] U.N. Office of Outer Space Affairs, *Index of Online General Assembly Resolutions Relating to Outer Space*, http://www.oosa.unvienna.org/SpaceLaw/gares/index.html (last visited Jun. 28, 2006).

[156] Marchisio, *supra* note 128, at 225-26.

[157] *Id.* at 223.

[158] Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 4 (1976).

[159] Marchisio, *supra* note 128, at 223.

[160] *Id.* at 225-26. *See also*, Bin Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

[161] *Id.*

3. The practice of States to adhere to the obligations in the Declaration of Legal Principles and the Outer Space Treaty confirms States' acceptance of the legal regime they contain

The examination of the legal validity of a resolution or declaration adopted by the General Assembly calls for the consideration of States responses before and after its adoption.[162] "The most important evidentiary value of... [the legal authority of a resolution] is not what is said at the international forum but what is done in the "real world."[163] The General Assembly's unanimous approval is not the most persuasive evidence of the legal validity of a resolution.[164] "A resolution may be so contrary to real world practice that its adoption may be regarded as a pious hope rather than as evidence of an accepted legal obligation."[165] Therefore, the "real world practice" must be examined regarding the Outer Space Treaty and the legal regime it contains.

The Outer Space Treaty embodies law that originated in a General Assembly declaration and the consideration of "real world" evidence regarding the acceptance of that law is necessary and relevant. As of January 1, 2006, a 65% majority of all of the world's Nations have ratified or signed the Outer Space Treaty.[166] Some important observers are even of the opinion that because of the large number of States that have accepted the Outer Space Treaty, it is "generally regarded as constituting binding customary international law, even for non-parties..."[167] Moreover, treaties that "provide for neutralization or demilitari-

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[162] LOUIS HENKIN ET AL., *supra* note 110, at 107.

[163] Oscar Schachter, *Towards A Theory of International Obligation*, 8 VA. J.INT'L L. 300, 311-19 (1968), *in* THE EFFECTIVENESS OF INTERNATIONAL DECISION 9-31 (S. Schwebel ed. 1971).

[164] LOUIS HENKIN ET AL., *supra* note 110, at 107.

[165] *Id.*

[166] There are 192 member States of the United Nations. United Nations, List of Member States, http://www.un.org/Overview/unmember.html (last visited Jun. 30, 2006). Of those, 98 have ratified the Outer Space Treaty and 27 have signed it. United Nations Office for Outer Space Affairs, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, http://www.unoosa.org/oosa/SpaceLaw/outerspt.html (last visited Jun. 30, 2006).

[167] PHILLIP A. JOHNSON ET AL., *supra* note 129, at 27.

sation of a territory or area, such as ...outer space"[168] "have been held to create a status or regime valid *erga omnes* (for all the world)."[169] To date, no State Party has been known to breach the treaty obligations. Together, these facts and informed opinion provide evidence that clearly demonstrates that the practice of States has established a consensus that the Outer Space Treaty establishes a binding legal regime.

B. *The Outer Space Treaty does not Suspend During "War" or "those Measures Short of War"*

Two persuasive reasons explain why the outbreak of "war" or "those measures short of war" does not suspend the treaty obligations contained in the Outer Space Treaty. First, the modern theory regarding the legal effect of war on treaties, establishes a general presumption that war does *not ipso facto* terminate or suspend treaty obligations.[170] Moreover, as a result of the effort to maintain international order it is expected that there will be fewer factual circumstances in which belligerents are unable to comply with treaty obligations while engaging in hostilities.[171] In order to continue to build and foster diplomatic relations between State Parties there is even more of a greater desire to preserve treaty relations during hostilities. In fact, during hostilities State Parties most need treaty obligations to maintain international stability. If the general presumption is that treaty obligations are preserved and that they continue in force during hostilities, then the execution of the treaty obligations contained in the Outer Space Treaty do not suspend during "war" or "those measures short of war". Secondly, the treaty obligations contained in the Outer Space Treaty do not suspend because they are not incompatible with a state of war. Belligerents can comply with the treaty obligations while engaging in

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[168] AUST, *supra* note 130, at 208.

[169] *Id.* at 208 (citing MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 24-7 (1997)).

[170] MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut De Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

[171] AUST, *supra* note 130, at 243.

hostilities because they do not impose additional obligations other than those already established by the law of war.

1. There is an emerging presumption that treaties remain in force during "war" or "those measures short of war"

Scholars have long realized that the outbreak of war does not *ipso facto* terminate or suspend treaty relations.[172] Nevertheless, a general consensus exists that States may suspend treaty obligations if belligerents are unable to comply with them.[173] As the traditional notions of "war" evolve, and States move away from formally declaring "war" to engaging in conflicts characterized as "measures short of war", scholars recognize fewer instances in which belligerents may potentially assert that the treaty obligations are incompatible with a state of war.[174] This argument is based on the presumption that the legal significance of a formal of state of war is no longer as important as perceived in past years.[175]

Modern scholars have begun to realize that few legal consequences arise from a formal declaration of war. Scholars have adopted this view based upon States' practice. Over the years, States have begun to realize the importance of maintaining and preserving international order. This is evident by the fact that States no longer formally declare a state of war. Before the evolution of the traditional notions of war, the formal declaration of war triggered certain legal consequences such as the termination of diplomatic relations. To avoid this legal consequence, States began to engage in lesser forms of conflict which at the time were perceived to have a less dramatic effect on diplomatic relations.

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[172] MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 109, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut de Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

[173] *Id.*

[174] *Id. See also*, Greenwood, *supra* note 49, at 297, 303, 304.

[175] *Id.*

Considering States' practice many scholars[176] and the world renowned Insitut de Droit International,[177] has adopted the view that the outbreak of war does not *ipso facto* terminate treaty obligations nor does it suspend them.[178] The Institut does recognize an exception to the general rule of preserving treaty obligations, in those instances of self defense which are in accordance with the U.N charter. Applying the modern trend to the issue of whether or not the outbreak of "war" or "those measures short of war" terminates or suspends the Outer Space Treaty, the most logical inference is that the treaty obligations continue in force during hostilities. In fact, there have been two "wars" in which space assets were used, the 1991 Persian Gulf War and the 2003 War in Iraq and the Outer Space Treaty was not suspended during either of them.

2. The Outer Space Treaty does not impose additional obligations on belligerents other than those already imposed by the law of war

The outbreak of "war" or "those measures short of war" does not suspend the execution of the obligations contained in the Outer Space Treaty between or among belligerents because both the Outer Space Treaty and the law of war declare that belligerents may not interfere with the rights of neutral States. Article

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[176] MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut de Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

[177] The Institut de Droit International is committed to the study and development of international law. "A non-official body, the Institut de Droit International, established in 1873, is composed of about 120 members and associate members elected by the Institut on the basis of individual merit and published works. Its resolutions setting forth principles and rules of existing law and, on occasion, proposed rules, have often been cited by tribunals, states and writers." LORI F. DAMROACH, LOUIS HENKIN, RICHARD PUCH, ET AL., INTERNATIONAL LAW AND CASE MATERIALS 141 (4th ed. 2001). *See also* Institut de Droit International, *History*, http://www.idi-iil.org/idiE/navig_history.html (last visited Jun. 30, 2006).

[178] MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut de Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

I of the Outer Space Treaty states, "that outer space shall be free for exploration and use by all States without discrimination of any kind."[179] This provision gives all States, including neutral States, the freedom to use and explore outer space without interference from any other State, including belligerents. Similar to the principle of noninterference, the law of war through the Hague Convention of 1907 also protects the rights of non-belligerents.[180] According to the principle of neutrality, "non-belligerents are entitled to have their territory and doings respected and unaffected by [hostilities]."[181]

Both noninterference in the Outer Space Treaty and neutrality in the law of war are, in essence, the same: they are both concerned with protecting the peaceful activities—"use" and "doings"—in an area or region by non-belligerents. Therefore, even if belligerents want to suspend the execution of the obligations in the Outer Space Treaty, they are still obligated to comply with the principle of neutrality under the law of war. And, because the Outer Space Treaty does not impose additional obligations on belligerents other than those already established by the law of war, its obligations are not suspended by "war" or "those measures short of war"

V. CONCLUSION

The outbreak of "war" or "those measures short of war" does not *ipso facto* terminate or suspend the execution of the Outer Space Treaty. To avoid the legal consequences that flow from a formal state of war, States no longer declare war. The evolution of the traditional notions of "war" has completely changed the beliefs of legal scholars regarding the effect of "war" or "those measures short of war" on the operation of treaties. States rec-

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[179] Outer Space Treaty, supra note 1, at art I.

[180] ROBERTS & GUELFF, *supra* note 76, at 86.

[181] LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 258 (1993). *See also*, Georgios C. Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575 (1998) (arguing that "state practice has established that the laws of war and neutrality are now conditioned on the existence of armed conflict rather than official declarations of war."); DETTER, *supra* note 125, at 346 (arguing that the law of war and neutrality are activated by armed conflict instead of a formal declaration of war).

ognize the importance of preserving and maintaining international legal order, so they are reluctant to terminate or cancel treaty obligations during hostilities.

CASE NOTE

DEFINING ANTITRUST INJURY IN GOVERNMENT LAUNCH CONTRACTING: THE CASE OF *SPACEX V. BOEING*

*Jared W. Eastlack**

I. FACTS

The present case involved an antitrust action filed by the Space Exploration Technologies Corporation (SpaceX) against the Boeing Company (Boeing) and the Lockheed Martin Corporation (Lockheed) for allegedly engaging "in an unlawful conspiracy to eliminate competition in, and ultimately monopolize, the government launch business."[1] The United States District Court for the Central District of California dismissed the action without prejudice on February 16, 2006,[2] and SpaceX filed a second amended complaint.[3] On May 12, 2006, the District Court issued a second dismissal of the action with prejudice.[4]

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[1] Space Exploration Technologies Corporation v. Boeing Company, CV05-7533-FMC-(MANx), at 2 (C.D. Cal. Feb. 16, 2006) (order granting defendant's motion to dismiss plaintiff's first amended complaint) [hereinafter *SpaceX* Dismissal of First Amended Complaint].

[2] *Id.* at 16. Judge Cooper dismissed the first amended complaint without prejudice and gave SpaceX the opportunity to file a second amended complaint within twenty days of the entry of the dismissal order. *Id.*

[3] SpaceX's second amended complaint was filed on March 9, 2006. *SpaceX*, CV05-7533-FMC-(MANx) (C.D. Cal. Mar. 9. 2006) [hereinafter *SpaceX* Second Amended Com-

A. SpaceX Allegations

SpaceX alleged that in 1995 the U.S. government began a program to create evolved expendable launch vehicles (EELVs).[5] The U.S. Air Force (USAF) was responsible for administering the program and assigning launch contracts. Defendants Boeing and Lockheed were the only companies capable of providing EELV services at that time. The USAF received permission to deal exclusively with Boeing and Lockheed on June 9, 1998.[6] From 1998 until 2000 the USAF awarded EELV contracts solely to Boeing and Lockheed.[7] In 2000 Boeing and Lockheed began making allegations that EELVs were not commercially viable, and that they would require supplementary funds to sustain their EELV operations.[8] SpaceX alleged that both firms demanded the USAF deal on the same terms with both companies, and also demanded increased funding, which was later negotiated and granted for the EELV projects.[9]

On March 5, 2005, the USAF issued a Request for Proposals (RFP) for new two-to-three year EELV contracts. Once

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plaint]. The second amended complaint included additional specific information regarding SpaceX's ability to compete, and injuries it sustained as a result of conduct by Boeing and Lockheed in an effort to correct constitutional standing deficiencies. *See SpaceX* Dismissal of First Amended Complaint, *supra* note 1, at 16.

4 *SpaceX*, CV05-7533-FMC-(MANx), at 16 (C.D. Cal. May 12, 2006) (order granting defendant's motion to dismiss plaintiff's second amended complaint) [hereinafter *SpaceX* Dismissal of Second Amended Complaint]. The second dismissal opinion focuses on the same issues as the first, but mainly evaluates the additions in SpaceX's second amended complaint. *Id.* at 7-10.

5 The USAF began awarding EELV development contracts in 1995, but the first EELV launch contracts were not awarded until 1998. *Id.* at 12. Successful launches of EELV-class vehicles by Boeing and Lockheed, however, did not occur until 2002. *Id.*

6 *Id.* at 2. The USAF received a Justification and Approval to deal exclusively with Boeing and Lockheed in the market for EELV services, as they were the only two firms capable of delivering those services at the time. *Id.*

7 *Id.* at 2-3. It was the intention of the USAF to award contracts to both companies in hopes that they would compete with one another. *Id.* at 3.

8 Allegedly both firms refused to deal with the USAF unless first, the USAF agree to deal with both companies on the same terms, and second, they receive additional infrastructure sustainment subsidies for the EELV market. *Id.* In 2002 the USAF began making the infrastructure subsidy payments to Boeing and Lockheed. *Id.* This is a potential instance of anticompetitive behavior on the part of Boeing and Lockheed that forms a principal complaint of SpaceX in both its first and second amended complaints. *See infra* notes 50, 51.

9 *SpaceX* Dismissal of First Amended Complaint, *supra* note 1, at 3.

again, the USAF decided to only award contracts to Boeing and Lockheed, even though Boeing and Lockheed had agreed to consolidate their EELV operations into a single venture titled "United Launch Alliance" (ULA).[10] On April 21, 2005 the USAF awarded an exclusive RFP to Boeing and Lockheed for at least twenty-three scheduled launches from 2006-2011 and beyond.[11]

Consequently, SpaceX filed a protest with the Government Accountability Office (GAO) on August 15, 2005, but the launch schedule allocation remained the same. The allocation Boeing and Lockheed had with the USAF "ensured they would be reimbursed for the preparations" made for any launches beyond the contract period that had "been 'allocated' to them,"[12] a competitive advantage for ULA.

In its first amended complaint SpaceX asserted its vehicles for the EELV program would be cost competitive and available for launch by 2007.[13] Since ULA received the only contracts for that year and subsequent years, SpaceX filed an antitrust action alleging, among other things, violations of: (1) § 1 of the Sherman Act (prohibiting contracts, combinations, and conspiracies in restraint of trade);[14] (2) § 2 of the Sherman Act (prohibiting monopolization and attempts to monopolize);[15] (3) § 7 of the Clayton Act (prohibiting the acquisition of stock or share of

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[10] *Id.* SpaceX focused on this merger as another significant instance of anticompetitive behavior of Boeing and Lockheed, asserting that the merger increases negotiating power and eliminates the prospect of competition between them. *See SpaceX*, CV05-7533-FMC-(MANx), at 17 (C.D. Cal. Feb. 16, 2006) (first amended complaint).

[11] *SpaceX*, CV05-7533-FMC-(MANx), at 4 (C.D. Cal. Feb. 16, 2006) (order granting defendant's motion to dismiss plaintiff's first amended complaint). SpaceX argued that though the exclusive RFP no longer applied to launches that would occur after 2008, the launch allocation matrix through 2011 did not change, leaving Boeing and Lockheed with all of the allocations. *Id.*

[12] *Id.* at 4. SpaceX based this assertion on the fact that the prospective allocation of the EELV launch is determinative, even if the contract for that launch has not actually been assigned because Boeing and Lockheed will be reimbursed for their preparations in these launches through infrastructure subsidies, so it is unlikely that the USAF would want to reallocate a launch contract to a competing firm once it has already invested in the launch preparation with another. *SpaceX*, CV05-7533-FMC-(MANx), at 10 (C.D. Cal. Nov. 11, 2005) (first amended complaint) [hereinafter *SpaceX* First Amended Complaint].

[13] *SpaceX* First Amended Complaint, *supra* note 12, at 9.

[14] *Id.* at 22-24.

[15] *Id.* at 24-26.

capital where the effect of such acquisition is to severely lessen competition);[16] (4) Racketeer Influenced and Corrupt Organizations Act (RICO) (prohibiting persons from being associated with any enterprise in order to be involved in racketeering activity);[17] (5) RICO Conspiracy ("prohibiting conspiracies to commit substantive RICO violations");[18] (6)-(7) California Cartwright Act, Cal. Bus. & Prof. Code § 16720 (prohibiting the same activities as the Federal Sherman Act – conspiracy to restrain of trade and monopolization);[19] and (8) Cal. Bus. & Prof. Code § 17200 (prohibiting unfair business practices).[20]

B. Boeing and Lockheed Responses

Boeing and Lockheed each responded with a motion to dismiss the action. Boeing moved to dismiss claiming that SpaceX lacked Article III standing since SpaceX had not yet developed a workable version of its EELV, and was therefore not a competitor in the market.[21] Boeing also asserted that SpaceX failed to allege facts sufficient to support the underlying elements of each of its claims.[22] Third, Boeing argued SpaceX's complaint was merely a bid protest, and was therefore the exclusive province of the Court of Federal Claims.[23]

Lockheed moved to dismiss as well, stating that since SpaceX has no viable vehicle it could not have suffered the requisite "injury-in-fact" of its antitrust claims.[24] Lockheed also claimed that as a competitor, rather than a consumer, SpaceX

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[16] *Id.* at 26-28.
[17] *Id.* at 28-43.
[18] *Id.* at 43-44.
[19] *Id.* at 44-48.
[20] *Id.* at 48-49.
[21] *SpaceX* Dismissal of First Amended Complaint, *supra* note 1, at 7. The failure of SpaceX to produce a workable version of an EELV precludes it from suffering injury-in-fact necessary for constitutional standing. *Id.*
[22] *Id.* Even if standing was established, Boeing argued that SpaceX's claims were not concrete enough to support its antitrust actions. *Id.*
[23] *Id.* SpaceX admitted in its first amended complaint that Court of Federal Claims had jurisdiction over disputes regarding contracts awarded through 2006. *Id.* at 10 n.2. Since SpaceX would not be able to launch an EELV until 2007 and claim of relief before the District Court would have to be forward looking based on potential injury. *Id.* at 10.
[24] *Id.*

did not have standing to bring an action under § 7 of the Clayton Act.[25] Further, Lockheed asserted that the Noerr-Pennington doctrine prohibited the antitrust claims of SpaceX.[26] Fourth, Lockheed argued that SpaceX's unfair business practices claim under California Business & Professional Code § 17200 had to fall because SpaceX had not stated a requisite underlying violation of law.[27]

II. DISMISSAL OF FIRST AMENDED COMPLAINT

The District Court in its dismissal opinion for SpaceX's first amended complaint held that SpaceX had not alleged an injury-in-fact necessary to sustain its antitrust claims, and dismissed the action without prejudice. The Court held the "irreducible constitutional minimum" of standing requires: "(1) the plaintiff have suffered some injury in fact – an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and conduct complained of – the injury has to be fairly traceable to the challenged action of some third party not before the court; and (3) the likelihood that the injury will be redressed by a favorable decision."[28] The first requirement was the focus of the Court's opinion. The Court noted that the "mere possibility of injury" was not sufficient to establish standing for a party.[29] The Court found that "SpaceX's argument was utterly devoid of any concrete factual allegations regarding any type of actual injury suffered."[30] SpaceX's allega-

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[25] *Id.* Since the constitutional minimum of standing was the primary issue considered by the District Court in its order to dismiss the first amended complaint, it did not address whether SpaceX had the specific statutory standing to bring an action under § 7 of the Clayton Act.

[26] *Id.* Since standing was the primary issue considered by the District Court in its order to dismiss the first amended complaint, it did not address whether Noerr-Pennington immunity was appropriate for Lockheed's conduct.

[27] *Id.* Since there was no standing, there was no consideration of whether there was a violation of law, and therefore no instance to violate the *California Business & Professional Code.*

[28] *Id.* at 8-9.

[29] *Id.* at 9.

[30] *Id.* at 11.

tions were simply too vague to confer standing.[31] The District Court did note that certain circumstances would allow a court to offer forward looking injunctive relief based on possible future injury, but only if the injury was imminent.[32] However, since SpaceX lacked the readiness to compete with Boeing and Lockheed in the EELV market, SpaceX's claims were held to be unripe.[33]

In the dismissal order for the first amended complaint, the District Court gave special consideration to the "final allocation" issues alleged in SpaceX's complaint.[34] First, the Court found that there were no final allocations of launch contracts made in the time period in which SpaceX would have been able to provide an EELV.[35] So the inference that the USAF would refuse to deviate from its initial allocations despite its express intent to offer up the launch allocations for competitive bidding had no justification.[36] The second issue surrounding final allocation was whether the USAF was fairly weighing EELV bids considering the substantial infrastructure subsidies Boeing and Lockheed received.[37] Since SpaceX did not receive such subsidies, its bids would always be higher if the subsidy payments were not factored into the bids.[38] The Court held that since it was the

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[31] *Id.* at 14.

[32] *Id.* at 11 n.4. The plaintiff must still be in a position to compete otherwise the injury cannot be imminent, because a plaintiff cannot be said to suffer an injury if it was not able to participate in the market in the first place.

[33] *Id.* (noting that even in situations were injunctive relief for potential injury has been employed, the plaintiff is still responsible for showing that the potential injury from the defendant's conduct is "imminent").

[34] SpaceX argued that even though the allocations made by the USAF to Boeing and Lockheed were provisional and not final, the allocation would be difficult to alter at a later date because of the investment that goes into pre-launch preparations, so it was effectively excluded from competing for the EELV launches allocated from 2006-2011. *Id.* at 14. *See also SpaceX* Second Amended Complaint, *supra* note 3, at 38 (explaining why Boeing and Lockheed would likely preserve the launch contracts to the launches that had been prospectively allocated to them).

[35] *SpaceX* Dismissal of First Amended Complaint, *supra* note 1, at 14. The District Court accepted USAF representations made before the Court of Federal Claims that the USAF would not make the prospective EELV launch allocations final without allowing other bidders to put forth offers for individual launches already allocated to Boeing or Lockheed. *Id.*

[36] *Id.* at 15.

[37] *Id.*

[38] *Id.*

express policy of the USAF to factor in these subsidies when evaluating bids, there was no reason to doubt this was the case, and without a showing of failure to do so, there could be no actual injury.[39] Although the court ultimately decided to dismiss SpaceX's action without prejudice, it did offer SpaceX leave to amend its complaint to mend the standing deficiencies.[40] The court, however, expressed doubt about SpaceX's ability to overcome the constitutional standing problems even with a second amended complaint.[41]

III. SPACEX'S SECOND AMENDED COMPLAINT

On March 9, 2006 SpaceX filed its second amended compliant against Boeing and Lockheed. This was within the 20 day period provided for in the dismissal order. In its second amended complaint SpaceX provided more specific descriptions of its launch capabilities and business transactions in order to demonstrate its viability and establish its standing to bring the suit by showing an injury-in-fact.

First, SpaceX explained that it offered several different EELV options for governmental and commercial customers. A Falcon 1 EELV with one rocket, a Falcon 5 with five rockets, and its largest EELV, the Falcon 9 with nine rockets.[42] SpaceX noted that it had already built three Falcon 1 EELVs and its Falcon 9 would be completed soon for its 2007 launch.[43] SpaceX alleged that it had already entered the market for EELVs with a $30 million Government contract signed in 2005 for its Falcon 9 EELV which was scheduled to launch in 2007.[44] Since payments from customers begin well in advance of the anticipated launch in the aerospace industry, and SpaceX had already begun receiving payments on this $30 million Government contract,[45] it argued that it was already a participant in the EELV market.[46]

[39] *Id.* at 15-16.
[40] *Id.* at 16.
[41] *Id.* at 16.
[42] *Id.* at 11.
[43] *Id.* at 13.
[44] *SpaceX* Second Amended Complaint, *supra* note 3, at 5.
[45] *Id.* at 12.
[46] *Id.* at 5.