

AERIAL INCIDENT OF 7 NOVEMBER 1954
(UNITED STATES OF AMERICA *v.* UNION OF
SOVIET SOCIALIST REPUBLICS)

INCIDENT AÉRIEN DU 7 NOVEMBRE 1954
(ÉTATS-UNIS D'AMÉRIQUE *c.* UNION DES
RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES)

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PART I

APPLICATION INSTITUTING
PROCEEDINGS AND PLEADINGS

SECTION A.—APPLICATION INSTITUTING PROCEEDINGS

PREMIÈRE PARTIE

REQUÊTE INTRODUCTIVE D'INSTANCE
ET MÉMOIRES

SECTION A. — REQUÊTE INTRODUCTIVE D'INSTANCE

APPLICATION INSTITUTING PROCEEDINGS¹

THE AGENT OF THE GOVERNMENT OF THE UNITED
STATES OF AMERICA TO THE REGISTRAR OF THE
INTERNATIONAL COURT OF JUSTICE

DEPARTMENT OF STATE,
WASHINGTON.

June 8, 1959.

Sir:

1. This is a written application, in accordance with the Statute and Rules of the Court, submitted by the Government of the United States of America instituting proceedings against the Government of the Union of Soviet Socialist Republics on account of certain wilful acts committed by fighter aircraft of the Union of Soviet Socialist Republics. These fighters attacked and destroyed a United States Air Force B-29 airplane engaged in legitimate and peaceable flight in the area of the Japanese Island of Hokkaido and caused thereby the death of one crew member of the B-29, an American national, and injury to the remaining members of the B-29 aircraft, all American nationals. This incident occurred on November 7, 1954.

The subject of the dispute and a succinct statement of the facts and grounds upon which the claim of the Government of the United States of America is based are adequately set forth in a note delivered to the Soviet Government on May 23, 1957. A copy of the note is attached to this application as an annex.

The Soviet Government has asserted various contentions of fact and law with reference to the United States Government's claim in other diplomatic correspondence on this subject, including notes attached as annexes to this application, namely the notes of November 7, 1954 and December 11, 1954, a note of August 19, 1957, in reply to the United States Government's note of May 23, 1957, and a note of March 4, 1959, in reply to the United States Government's note of June 19, 1958, copies of which are also attached hereto as annexes.

2. The United States Government observes that the dispute between the United States Government and the Soviet Government as set forth in the foregoing diplomatic correspondence concerns matters of the nature specified in Article 36 (2) of the Statute of the Court, including subdivisions (a) through (d). As will be seen from

¹ See Part IV, *Correspondence*, No. 1, p. 38.

the annexes, the legal dispute of the United States Government with the Soviet Government involves serious questions of international law. Some of these questions were also involved to some extent in the case of the Aerial Incident of October 7, 1952, which was described in the application filed with this Court on June 2, 1955. These include the legality in international law of the Soviet claims to land, waters and air space in the area of the Habomai Islands and Shikotan, and to Kunashiri and Etorofu, and their territorial waters and air space.

The incident of November 7, 1954 thus represents an aggravation of the conduct complained of by the United States in its earlier application against the Soviet Government. In addition there are involved the apparent Soviet claims to treat as hostile peaceable aircraft of the United States over international waters and in the air space in the Goyomai Strait and leading thereto, as well as all Soviet claims of sovereignty in this area. In that connection, there is involved the interpretation of the Treaty of Peace with Japan signed by the United States and other governments in San Francisco on September 8, 1951. There are also involved the scope and application of international obligations relating to the interception by military aircraft, together with other issues of fact which if resolved in favor of the United States Government would demonstrate breaches of international obligation by the Soviet Government; and the nature and extent of reparations to be made by the Soviet Government to the United States Government for all these breaches.

The United States Government, filing this application with the Court, has submitted to the Court's jurisdiction for the purposes of this case. The Soviet Government appears not to have filed any declaration with the Court thus far. It was invited to do so by the United States Government as to the present dispute in the note of June 19, 1958. The Soviet Government has sent a negative reply thereto. The Soviet Government is, however, qualified to submit to the Court in this matter and may, upon notification of this application by the Registrar, in accordance with the Rules of the Court, take the necessary steps to enable the Court's jurisdiction over both parties to the dispute to be confirmed.

The United States Government thus founds the jurisdiction of this Court on the foregoing considerations and on Article 36 (1) of the Statute.

3. The claim of the Government of the United States of America is briefly that the Government of the Union of Soviet Socialist

Republics on November 7, 1954 caused fighter aircraft of its Air Force to overfly international air space and the territorial air space of Japan in the area of Hokkaido to intercept, attack and destroy a United States Air Force B-29 airplane engaged in legitimate and peaceful flight within Japan and the international air space adjacent thereto.

The United States Air Force, prior to and on November 7, 1954, had been duly authorized, by virtue of the Security Treaty between the United States and Japan, signed September 8, 1951, to conduct flights by military aircraft over Japanese territory. Pursuant to this authority, on the morning of November 7, 1954, a United States Air Force B-29, bearing serial number 42-94000, and with the identification call sign "AF-4705", was duly dispatched with instructions to fly in specified areas exclusively within the territorial confines of the Island of Hokkaido and the adjacent international air space. The aircraft's crew were eleven men, all members of the United States Air Force and nationals of the United States. The B-29 had flown along the southeast end of Hokkaido and had reached a point south of the town of Nemuro. The pilot then made a turn with the purpose of flying back along a parallel of latitude approximately 43 degrees, 18 minutes north, running through the island of Tomoshiri in the east and through the town of Shibechea in Hokkaido in the west. The B-29 executed a left turn over the international waters of the Pacific toward a heading of approximately 360 degrees due north, southwest of the tip of Nemuro Peninsula. Two fighter type aircraft of the Soviet Government moved in on the B-29 and while the B-29 was flying due west on a heading of 270 degrees in the Japanese territorial air space, the two Soviet fighters opened fire with successive bursts without any warning of an intention to fire and without any provocation by the B-29 justifying or reasonably calling for such hostile action. The firing of the Soviet fighters continued, directed to the destruction of the B-29, to the point where it had passed completely over the land mass of Hokkaido, so that the crew were forced to abandon the aircraft by parachute. The airplane crashed on Japanese soil near the village of Kamishunbetsu in Hokkaido and one crew member who had parachuted was seriously injured and died. Damage was also caused to the house of a Japanese national and to cultivated fields and crops of another Japanese national.

The facts are more fully set forth in the United States Government note of May 23, 1957. The damages suffered by the United States Government, for which the Soviet Government is liable, are specified in the annexed note of June 19, 1958 as well. The United States Government claims that in the circumstances described in the annex the actions chargeable to the Soviet Government constituted serious violations of international obligation

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for which the United States Government has demanded and demands monetary and other reparation.

In diplomatic correspondence with reference to this matter, including that which is attached hereto, the Soviet Government has asserted a version of the facts and of the law contrary to that asserted by the United States Government. The United States Government believes that in the circumstances recited the diplomatic channel of negotiations must be determined to have been exhausted. A dispute is therefore presented appropriate for hearing and decision by this Court in accordance with the Statute and Rules.

The United States Government, in further pleadings herein, will more fully set forth the issues of fact and the issues of law in this dispute. It will request that the Court find that the Soviet Government is liable to the United States Government for the damages caused; that the Court award damages in favor of the United States Government against the Soviet Government in the amount of \$756,604.09, and such other reparation and redress as the Court may deem fit and proper; and that the Court make all other necessary awards and orders, including an award of costs, to effectuate its determinations.

4. The undersigned has been appointed by the Government of the United States of America as its agent for the purposes of this application and all proceedings thereon.

Very truly yours,

(Signed) Loftus E. BECKER,
The Agent for the Government
of the United States of America.

Annexes

1. Note from the United States Government to the Soviet Government of November 7, 1954.
 2. Note from the Soviet Government to the United States Government of November 7, 1954.
 3. Note from the United States Government to the Soviet Government of November 17, 1954.
 4. Note from the Soviet Government to the United States Government of December 11, 1954.
 5. Note from the United States Government to the Soviet Government of May 23, 1957.
 6. Note from the Soviet Government to the United States Government of August 19, 1957.
 7. Note from the United States Government to the Soviet Government of June 19, 1958.
 8. Note from the Soviet Government to the United States Government of March 4, 1959.
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*Annex 1*NOTE FROM THE UNITED STATES GOVERNMENT TO THE
SOVIET GOVERNMENT OF NOVEMBER 7, 1954

No. 205.

The United States Government has been informed that a United States B-29 type aircraft was shot down over Japanese territory in the Hokkaido area on November 7 by two Soviet MIG-type aircraft.

The United States Government strongly protests this action. It will expect the Soviet Government to make all such moral and material reparations as lies within its power.

The United States Government will communicate further with the Soviet Government when the facts regarding human and material losses are more fully known.

*Annex 2*NOTE FROM THE SOVIET GOVERNMENT TO THE UNITED
STATES GOVERNMENT OF NOVEMBER 7, 1954

No. 93/OSA.

The Government of the Union of Soviet Socialist Republics considers it necessary to state the following to the Government of the United States of America.

In accordance with established facts on November 7 this year at 1320 hours local time (1241 hours Vladivostok time) a four-motored military airplane of the B-29 type with identifying marks of the military air forces of the USA violated the state boundary of the Soviet Union in the region of the island of Tanfilev (Kurile Islands) and continued to penetrate into the air space of the USSR in the direction of this island.

At the time of its flight over the island of Tanfilev the American airplane was met by two Soviet fighters with the purpose of indicating to it that it was within the limits of the boundaries of the USSR and of proposing that it immediately leave the air space of the Soviet Union. Upon the approach of the Soviet fighters the mentioned American airplane opened fire on them. In connection with this unprovoked action by the American violating airplane the Soviet airplanes were forced to open

answering fire, after which the American airplane left the air space of the Soviet Union in a southwesterly direction.

The Soviet Government decisively protests to the Government of the USA this gross violation by an American military airplane of the Soviet boundary.

This is a new instance of the violation by American military airplanes of the state boundary of the Soviet Union. The Soviet Government has brought the attention of the Government of the USA to similar instances of violation, in particular in its notes of September 5 and 8 of this year.

The Soviet Government notes with regret that instances of violation of the Soviet boundary by American military airplanes which occurred earlier involved in no way justified losses as was indicated in relevant notes of the Government of the USA.

The Soviet Government considers that the taking of measures for the prevention in the future of violations by American airplanes of the Soviet state boundary would be in the interests both of the Soviet Union and of the United States of America and expects that to this end appropriate instructions will be given by the Government of the USA to the command of the American military air forces.

Annex 3

NOTE FROM THE UNITED STATES GOVERNMENT TO
THE SOVIET GOVERNMENT OF NOVEMBER 17, 1954

No. 390.

The United States Government refers to its note of November 7 to the Soviet Government concerning the shooting down of a United States B-29 type aircraft in the Hokkaido area of Japan by two Soviet MIG type aircraft on November 7 (local time) and to the Soviet Government's note of the same date on this subject.

The United States Government rejects as unfounded the account of the incident contained in the Soviet note of November 7. The attack was initiated by Soviet aircraft without warning and without any attempt to signal the pilot of the American aircraft. The United States aircraft did not at any time fire on the Soviet aircraft. As a result of the unwarranted and hostile act of the Soviet aircraft, the United States aircraft was destroyed, crashing near the village of Nokkegun on Hokkaido.

The United States Government again protests this latest incident in a long series of unprovoked Soviet attacks on American aircraft on peaceful missions. In this connection, the United States Government would observe that the Soviet Government has not yet replied to the United States Government's note of September 25, 1954,

regarding the destruction of another American B-29 aircraft in approximately the same area and under the same circumstances. That note also reiterated that the United States Government supports the Japanese Government's contention that the Habomai group is an integral part of the national territory of Japan. The United States Government further shares the deep concern of the Japanese Government that the Soviet Government not only continues illegally to occupy Japanese territory in the Habomai Islands but also carries out unprovoked attacks on United States aircraft lawfully in this region.

The United States Government requests that appropriate disciplinary measures be taken with regard to those responsible for this unprovoked attack and that all other possible steps be taken to prevent the recurrence of such incidents which are in flagrant contradiction of recent statements by high Soviet officials that the Soviet Union seeks to abate international tensions. Such action by the Soviets would be in the mutual interest of the Governments of the USSR and the USA. In the absence of appropriate action by the Government of the USSR the United States Government will be impelled to provide the necessary defensive protection for United States aircraft engaging in these legitimate and peaceful missions and full responsibility for any consequences which ensue will devolve upon the Government of the USSR.

The Soviet Government is also informed that the United States Government reasserts and reserves its rights with reference to the human and material losses incurred as a result of the Soviet action of November 7.

Annex 4

NOTE FROM THE SOVIET GOVERNMENT TO THE UNITED STATES GOVERNMENT OF DECEMBER 11, 1954

No. 104/OSA.

In connection with the note of the Government of the United States of America No. 390 of November 17 of this year the Soviet Government considers it necessary to state the following:

The note of the Soviet Government of November 7 contained established facts, according to which on November 7 this year at 1320 local time (1241 Vladivostok time) an American four-motored military airplane of the B-29 type violated the state boundary of the USSR in the region of the island of Tanfilev (Kurile Islands) and continued to penetrate into the air space of the Soviet Union in the direction of this island. At the time of the flight over the indicated island the violating airplane was met by two Soviet fighter planes with the purpose of pointing out that it was inside the boundaries of the USSR, and to propose that it immediately leave the air space of the Soviet Union. However, the American plane upon

the approach of the Soviet fighters opened fire on them. In connection with this unprovoked action of the American airplane, the Soviet airplanes were forced to open answering fire. The American violating airplane left the air space of the USSR only after this and departed in a southwesterly direction.

The facts set forth above accurately established by appropriate verification refute assertions contained in the reference note of the Government of the United States of America, to the effect that the airplane of the United States was shot down on November 7 by Soviet airplanes over Japanese territory in the region of the Island of Hokkaido and to the effect that the attack was begun by Soviet airplanes.

From the note of the Government of the USA it follows that it does not dispute the fact that the flight of the American airplane of the B-29 type took place along the course indicated in the note of the Soviet Government of November 7 and that the encounter of the American airplane with the Soviet airplanes took place over the island of Tanfilev (Kurile Islands).

The Government of the USA alleges, however, that the American airplane did not open fire on the Soviet airplanes. Nevertheless, the fact that at the approach of the Soviet fighters the American airplane opened fire has been established by trustworthy means, including appropriate apparatus.

In this connection it is appropriate to call to mind that in the note of the Government of the USA of September 6 of this year regarding an American military airplane of the Neptune type, which had violated the state boundary of the USSR in the region of Cape Ostrovnoi on September 4 of this year, the assertion was also made that the American military airplane did not open fire at all on the Soviet fighters. However, later the Navy Department of the USA, and also the American representative in the UN in his speech in the Security Council on September 10, 1954, admitted that the American airplane actually did fire on the Soviet airplanes.

As regards the allegation of the Government of the USA to the effect that certain southern Kurile islands, in the region of which incidents with American airplanes took place, are not Soviet territory, this statement is without foundation and is in plain contradiction with provisions of the Yalta agreement on the Kurile Islands, in which the USA also is a participant. As is known, the Soviet Union on the basis of agreements between the Allies concerning the surrender of Japan accepted capitulation of the Japanese forces on the territory of all the Kurile Islands, which by decision of the Yalta conference were transferred to the Soviet Union. In accordance with the agreement mentioned above and in the directive of the staff of the Supreme Commander of the Allied Powers, MacArthur, of January 29, 1946, it is directly pointed out that these islands are excluded from the sovereignty of Japan along with other territories which were withdrawn from Japan.

In view of the foregoing, the Soviet Government states that the protest of the Government of the USA does not have basis.

The Soviet Government in its note of November 7 has already expressed its regret with reference to the fact that instances of violations by American military airplanes of the state boundary of the USSR which have taken place, including the instance which occurred on November 7, involve, as indicated in corresponding notes of the Government of the USA, losses and casualties which are in no way justified. In stating this, the Soviet Government proceeds on the assumption that henceforth measures will be taken on the part of the USA excluding repetitions of similar instances.

The taking of measures to prevent henceforth violations by American airplanes of the Soviet state boundary would permit similar incidents and losses connected with them to be avoided. However, it cannot but be observed that the statement of the Government of the USA that in the future it will "insure necessary defense" of airplanes of the US can in no way contribute to this. Such actions of the American military command could only increase the risk of repetition of similar incidents, not to mention that these actions would be contrary to the interests of lessening international tension. The Soviet Government confirms its note of November 7 of this year and expects that the Government of the USA will give appropriate instructions to the command of military air forces of the USA to take necessary measures to prevent in the future violations by American airplanes of the state boundary of the Soviet Union.

Annex 5

NOTE FROM THE UNITED STATES GOVERNMENT TO
THE SOVIET GOVERNMENT OF MAY 23, 1957

No. 945.

Excellency:

I have the honor to transmit to you herewith, upon the instruction of my Government, the following communication from my Government to your Government:

The Government of the United States of America refers again to the incident of November 7, 1954, in which fighter aircraft of the Government of the Union of Soviet Socialist Republics attacked and destroyed a United States Air Force B-29 airplane engaged in legitimate and peaceable flight in the area of the Japanese Island of Hokkaido. In its most recent note on this matter to the Soviet Government, of November 17, 1954, the United States Government informed the Soviet Government, *inter alia*, that it reserved its rights with reference to the human and material losses incurred as a result of the Soviet action of November 7, 1954. It also stated

that in the absence of action by the Soviet Government to prevent a recurrence of such attacks, the United States Government would be compelled to provide the necessary defensive protection for United States aircraft engaged in these legitimate and peaceful missions. The Soviet Government replied to this note on December 11, 1954. It asserted that its allegations of fact, which are contrary to the allegations of fact made by the United States Government, had been "established and checked". It also placed upon the United States Government the blame not only for this incident but for the risk of any other loss of life or property which might be occasioned by Soviet fighters should the United States provide defensive protection to its aircraft in similar circumstances in the future.

The incident of November 7, 1954 was not the first in which innocent and peaceable American aircraft had been attacked by Soviet fighters without provocation. The United States Government, therefore, having in mind the seriousness of the implications to international peace raised by this further incident, then instituted, with the active assistance and cooperation of Japanese authorities, a thorough reinvestigation and review of the entire incident of November 7, 1954. The reinvestigation and review confirm that the material assertions of fact in the United States Government's notes to the Soviet Government of November 7, 1954 and November 17, 1954 are correct; that the material assertions of fact by the Soviet Government in its notes of November 7, 1954 and December 11, 1954 are untrue; and that the Soviet Government is liable to make proper compensation to the United States Government for the injuries caused and to make such other amends as will deter it from any repetition of its wrongful conduct.

The purpose of the present communication is to place upon the record all the relevant facts and, based thereon, to prefer against the Soviet Government a formal international claim as set forth below. The United States Government still, as it has done with respect to similar prior incidents and in accordance with the policy announced by it in the Security Council of the United Nations on September 10, 1954, calls upon the Soviet Government to desist from acts of international violence, to respect international law and to follow the practices of international law for the peaceful settlement of international disputes.

I

The United States Government asserts, and is prepared to prove by evidence in an appropriate forum, the following:

1. Prior to and on November 7, 1954, the United States Air Force was duly authorized, by virtue of the Security Treaty between the United States and Japan, signed September 8, 1951, to conduct flights by military aircraft over Japanese territory.

Pursuant to this authority, on the morning of November 7, 1954, a United States Air Force B-29, bearing serial number 42-94000, and with the identification call sign "AF-4705", was duly dispatched with instructions to fly in specified areas exclusively within the territorial confines of the Island of Hokkaido and the adjacent international air space. The airplane was manned by a crew of eleven, all members of the United States Air Force and nationals of the United States, and each of them competent to perform the functions assigned to him with respect to the mission.

The B-29 proceeded in due course to the Island of Hokkaido. Commencing at approximately 1123 hours, the B-29 flew due east, at an altitude of approximately 16,000 feet, along a flight line running from approximately 144 degrees 20 minutes east longitude approximately along the parallel of latitude of 43 degrees and 15 minutes north, ending off the coastline between the villages of Konbumori and Nagafushi, south of the town of Nemuro and of the island of Tomoshiri, north of the island of Moyururi and west of Tatsumino Reef. The heading of the aircraft in this operation was 90 degrees and the operation was accomplished at approximately 1139 hours.

Thereupon the pilot turned right to a heading of 180 degrees, then further right to a heading of 240 degrees. The instructions of the B-29 crew, given to them prior to their departure, required them to fly in the area of the Nemuro Peninsula along a parallel of latitude of approximately 43 degrees, 18 minutes north, running through the island of Tomoshiri in the east and through the town of Shibecha in Hokkaido in the west, extending no further east than 145 degrees, 45 minutes east longitude. Noticing the favorable weather conditions therefor, the Aircraft Commander determined to fly from east to west on an adjacent line running from approximately 145 degrees 40 minutes east longitude approximately along the parallel of latitude of 43 degrees 18 minutes north, and therefore then executed a turn to the left over the international waters of the Pacific Ocean toward a heading of approximately 360 degrees due north. While flying on the due north heading, south of Tatsumino Reef and southwest of the tip of Nemuro Peninsula, crew members of the B-29 noticed to the east of the course of the B-29 two fighter-type aircraft flying toward the B-29 from its right rear. The fighters were not immediately visible to the Aircraft Commander or other officers in their positions in the nose of the B-29, but upon the presence of the fighter aircraft being called to their attention by the crew members the officers in the nose of the B-29 succeeded in perceiving them at a distance which appeared to be approximately eight to ten miles away to the east moving in toward the B-29 on a relative bearing of approximately 145 degrees from the B-29. Immediately on sighting these fighters, and concluding from their silhouettes that they were probably of the MIG type, the Aircraft Commander caused the

B-29 to turn left, by a 90 degree turn, to a heading of 270 degrees, intending thereby to avoid any possible encounter with the Soviet aircraft and, by flying farther inward and toward the Japanese land mass, to emphasize the peaceable purpose and legitimate flight of the B-29. The position of the B-29's turn was just south of Tatsumino Reef and two to three miles west of the tip of Nemuro Peninsula. As the B-29 was rolling out of its 90 degree turn and commencing a level flight due west on a heading of 270 degrees, the two MIG fighter aircraft closed in on the B-29 from the rear and opened fire with successive bursts in an attack deliberately designed to destroy the B-29 and its crew. The B-29 was hit on the tail and left wing and aileron. At the moment of the attack the B-29 was passing from the international air space over the waters of the Pacific Ocean, and was entering the territorial air space of Hokkaido, and the time was approximately 1148 hours. No warning whatever had been given in any way by the MIG fighter aircraft to the B-29 of intention to fire, nor had any provocation been given by the B-29 justifying or reasonably calling for such hostile action.

The Aircraft Commander, continuing on the same westerly heading of 270 degrees, promptly commenced a descent in an attempt to evade further attack from the Soviet fighter aircraft and to reach the Hokkaido land mass. But the attacking Soviet fighter aircraft closed in from the rear in a hostile firing attitude and opened fire on the B-29 as it descended and flew westward. Fuel which had been pouring out of the left fuel tank was set afire. The B-29 was, as a result of the further damage inflicted by the Soviet fighter aircraft, becoming difficult to control and its pilot was unable to make any further evasive maneuvers. At the time of this second attack the position of the B-29 was over Japanese territorial waters east of Moyururi Island. Nevertheless, at least one of the Soviet fighters again proceeded to the rear of the B-29, again closed in and again opened fire in Japanese territorial air space as the B-29 was reaching Moyururi Island and again hit the B-29. Unrelenting, at least one of the Soviet fighters proceeded again to the rear of the descending, burning B-29 and again resumed a firing attitude, but apparently seeing the hopelessness of the B-29 desisted from firing. At that point, the B-29, aflame, had reached an altitude of 11,000 feet and was close to or over the shoreline of Moyururi Island at approximately latitude 43 degrees 13 minutes north, longitude 145 degrees 37 minutes east. The Aircraft Commander was compelled to elect to abandon the airplane in the air. He gave his crew the order to bail out, which the crew obeyed, in the air space of Hokkaido west of the village of Konbumori. The crew all landed on the ground safely, except Lt. Sigfredo Angulo, who was seriously injured and died. The B-29, unmanned and unable to maintain the course set by the pilot before abandonment because of the damage done it by the attacking Soviet fighters, crashed to the ground by the village

of Kamishunbetsu in Notsukegun, completely demolishing the house of a Japanese national and destroying its contents and damaging cultivated fields and crops belonging to another Japanese national.

2. The United States Government has concluded from its investigation that the actions of the Soviet fighters during the entire encounter, including each of the attacks, were planned, initiated, directed and continuously controlled by responsible authorities of the Soviet Government for the purpose of accomplishing the destruction of the B-29 and the death of its crew; that the attacks, which were unprovoked, took place in the territorial air space of Japan or in the contiguous international air space with knowledge that no provocation legally justifying such action had been offered by the B-29; and that no prior opportunity had been afforded to the B-29 to avoid attack and that no warning of intention to attack had been given to it in any way by the Soviet fighter aircraft.

II

The Soviet Government has, in the two notes on this incident above mentioned, made statements of fact with respect to the incident which, the United States Government has concluded, are in material respects untrue. The United States Government is buttressed in these conclusions by the fact that the Soviet Government has again chosen to reiterate stereotype and demonstrably untrue allegations such as it has heretofore asserted concerning each of a number of unprovoked attacks by Soviet fighters on innocent United States military aircraft. Among these false statements of fact, as the United States Government is prepared to prove by evidence in an appropriate forum, are the following:

1. That the B-29, at 1320 hours local time, or 1241 hours Vladivostok time, flew over the Island of Tanfilev. This statement, contained in both the Soviet note of November 7, 1954 and the Soviet note of December 11, 1954, is preceded by the statement that the B-29 "violated the state boundary of the USSR in the region of the Island of Tanfilev" and that it "continued to penetrate into the air space of the Soviet Union in the direction of this island". It is assumed that the Soviet Government is referring to the Habo-mai island of Suisho which, on November 7, 1954, and for some time prior thereto, Soviet authorities occupied. The fact is that the B-29 flew neither over nor near Suisho Island nor did it cross any frontier of the Soviet Government, or any kind of frontier known to be claimed by the Soviet Government, in this area. On the contrary, the flight of the B-29, to the time of encounter by the Soviet fighters, was, as recounted above, performed entirely south of the Nemuro Peninsula, in the territorial air space of the Japanese Island of Hokkaido, or in the contiguous air space over the high seas of the Pacific Ocean. Assuming that the time of the alleged overflight.

stated in the Soviet notes as 1320 hours local time, was 1141 hours Japan time, the United States Government has concluded that the position of the B-29 at that time was approximately 145 degrees 43 minutes east and 43 degrees 11 minutes north, and not less than sixteen nautical miles from the nearest shoreline of Suisho Island. The B-29 was then on a heading of south over the coastline and waters south of the town of Nemuro, southwest of the east tip of Nemuro Peninsula and southwest of Tatsumino Reef, and it was headed still farther from Suisho Island and it continued to fly as far as approximately twenty-five nautical miles from the nearest shoreline of Suisho Island prior to making its turn to the left from its heading of 240 degrees as has been described above.

2. That the B-29 was met by two Soviet fighters while it was in flight above the Island of Suisho, or Tanfiev. The fact is that the two Soviet fighters which attacked the B-29 approached it from the rear, and never in any other attitude, at a point due south of the Nemuro Peninsula and over the contiguous international waters of the Pacific Ocean.

3. That the Soviet fighters met the B-29 with the intention of pointing out to it that it was within the boundaries of the Soviet Union and of proposing that the B-29 immediately leave that air space. As has unfortunately become usual in this stereotype allegation, the Soviet Government does not state precisely what maneuvers or conduct, if any, the Soviet fighters are claimed to have performed in conveying or attempting to convey any such communication or in preparing to do so. The United States Government reiterates that in truth the approach of neither of the two fighter aircraft in this case was compatible with any intelligible attempt to convey any peaceable communication. On the contrary, the United States Government has concluded that the fighter aircraft approached the B-29 first, and only from the rear and at a considerable distance to the east, for the purpose of identifying it as a United States aircraft and then, having reported that fact to the responsible Soviet ground control authorities, the fighter aircraft were directed to proceed immediately, and did so proceed, from the immediate rear in exclusively hostile attitude to attack and destroy the B-29, although the B-29 was then passing from the international air space over the waters of the Pacific Ocean immediately contiguous to Japanese territory in the Island of Hokkaido and entering the territorial air space of Hokkaido; and they then repeatedly again so proceeded even while the B-29 and the fighters were within the territorial air space of Hokkaido. The fighters did not evince, nor did they have, any intention at any time to make any peaceable communication, or to give any warning of any kind, as to their purpose; the approach of the two fighter aircraft was totally incompatible with any customary or recognized attempt to convey any peaceable communication.

4. That the B-29, on the approach of the Soviet fighters, opened fire against them. This stereotype allegation is false. At no time, even after the initial attack by the Soviet fighters, did the B-29, or any member of its crew, fire upon the Soviet fighter aircraft.

5. That the Soviet fighters were forced to open fire in reply. This is similarly false, particularly inasmuch as the B-29, when the Soviet fighter aircraft first approached it, prior to firing, and from then on until the disengagement, was flying continuously in a westerly direction and farther and farther away from Soviet-held territory, a fact which was obvious to the pilots of the Soviet aircraft and to their ground controllers; and the attacks of the fighters upon the B-29 were accomplished by overtaking the B-29 from a safe distance to the rear of the B-29.

6. That only after the Soviet fighter aircraft fired upon the B-29 did the B-29 leave the air space of the USSR and that it flew off in a southwesterly direction. The fact is that, on the contrary, the B-29 had taken a turn to a westerly heading even before the Soviet fighter aircraft, coming from the rear, approached close to the B-29 in hostile attitude. The mortal injuries were inflicted by the Soviet fighters on the B-29, in successive attacks, after the B-29 had made its left turn and was on its flight to the westward, first passing from the international air space over the waters of the Pacific Ocean, and entering the territorial air space of Hokkaido, Japan and then within that territorial air space. At the moment of first attack the B-29, the United States Government has concluded, was no closer than fifteen nautical miles in a direct line from the shoreline of Suisho Island; the subsequent attacks were made by the Soviet fighter aircraft, as has been stated above, even farther from Soviet-held territory and within the territorial air space of Hokkaido, Japan.

7. That the United States Government does not dispute that the flight of the B-29 took place as stated in the Soviet Government's note of November 7, 1954, and it does not dispute that the encounter of the B-29 with the Soviet aircraft occurred over the Island of Tanfilev. On the contrary, the United States Government definitely disputes these allegations, and it characterizes them as false.

8. That the fact that the B-29 opened fire on the approach of the Soviet fighters has been established by trustworthy means, including appropriate instruments. The United States Government must express its doubt that the Soviet Government is in position to produce any instruments or evidence of reliable character establishing any such fact; for its own part, it is prepared to prove by incontrovertible evidence that none of the guns of the B-29 was ever fired during its flight on November 7, 1954.

III

The United States Government has concluded, for the reasons set forth below, that the Soviet Government in the foregoing facts was guilty of deliberate and willful violation of applicable rules of international law on account of which it has become liable to the United States Government for damages and other amends.

1. In the circumstances of fact described above, it was unlawful for the Soviet aircraft to have attacked the B-29 at any time or place.

2. The Soviet Government omits, significantly, to state that the Soviet fighters made four concerted firing attacks on the B-29. It is, therefore, not clear whether the Soviet Government prefers to disregard any of these attacks. The United States Government asserts that had the B-29, contrary to the fact, directed fire on the Soviet fighters after any attack by the Soviet fighters such attack of the fighter aircraft and the subsequent obviously hostile approach would constitute legal justification for fire from the B-29 as an act of self-defense.

3. The Soviet Government states in its notes of November 7, 1954, and December 11, 1954, that the two Soviet fighters involved in the incident approached the B-29 "with the purpose of pointing out that it was inside the boundaries of the U.S.S.R. and to propose that it immediately leave the air space of the Soviet Union". The United States of America denies that this was the purpose of the approach of the Soviet aircraft. It notes that the B-29 had not entered Soviet territory and was not engaging in any activity which represented a clear and present danger to the Soviet Union. The Soviet aircraft immediately upon its first approaching the B-29 opened fire rather than giving visual signals or otherwise proposing that the B-29 alter its course. Since the B-29, upon the appearance of the Soviet fighters, turned in a westerly direction and proceeded farther away from the area claimed to be territory of the Soviet Government, it was the duty of the Soviet authorities to refrain from any action not necessary for the defense of the Soviet Union. In the facts and circumstances described any fire from the Soviet aircraft was entirely unwarranted.

IV

The Soviet Government has, in its notes on this incident, adverted to its territorial claims to the Habomai Islands and to adjacent water and air space. It has, by implication, raised question as to the extent of such claims. Although as is well known the United States Government challenges the Soviet Government's territorial claims to these islands, it has not chosen to do so by any overflights of any disputed area, and specifically not in cir-

cumstances such as those involved in the incident of November 7, 1954, or by any method other than the channels of peaceful, diplomatic negotiation and judicial determination. The United States Government, therefore, takes this opportunity to make the following declarations:

A. With respect to the Soviet claim of sovereignty over the Habomai Islands:

1. In its note of November 17, 1954, the United States Government stated that the United States supports the Japanese Government's contention that the Habomai group of islands is an integral part of the national territory of Japan which the Soviet Government continues illegally to occupy. The Soviet Government's note of December 11, 1954, commenting on this statement, says this is "in plain contradiction to the provisions of the Yalta Agreement on the Kurile Islands". The United States Government, making reference for a fuller statement of its position in this regard to the note of September 25, 1954, which is incorporated in the records of the International Court of Justice as an annex to the United States Government's application instituting proceedings against the Soviet Government on account of a similar incident of October 7, 1952, reiterates that the Yalta Agreement regarding Japan of February 11, 1945 was neither intended to nor did it have the effect of conveying legal title in any Japanese territory to the Soviet Union; that in particular neither the Yalta Agreement regarding Japan nor the Treaty of Peace with Japan, signed in San Francisco on September 8, 1951, conveyed any title in the Habomai Islands to the Soviet Union or diminished the title of Japan in those islands, and the phrase "Kurile Islands" in those documents does not and was not intended to include the Habomai Islands, or Shikotan, or the islands of Kunashiri and Etorofu which have always been part of Japan proper and should, therefore, in justice be acknowledged as under Japanese sovereignty. The action of the Soviet Government in purporting to appropriate those islands and to exercise sovereignty over them is, therefore, wrongful and illegal and was wrongful and illegal on November 7, 1954. The United States Government notes again that the Soviet Government has consistently failed and refused to submit the validity of its contentions in this regard to examination by established judicial process in the interest of the peaceful settlement of international disputes and of the maintenance of international law and order.

2. In the note of December 11, 1954, the Soviet Government also cites as justification of its claim of title to the Habomai Islands, which it now denominates as "certain Southern Kurile Islands", that these islands were "excluded from the sovereignty of Japan" by the Soviet Government's acceptance of the capitulation of Japanese forces "on the territory of all the Kurile Islands"

"on the basis of agreements between the Allies". The United States Government denies that any agreements between the Allied Powers in the war against Japan provided any justification for the Soviet appropriation of any territory, particularly the Habomai Islands and Shikotan, and the islands of Kunashiri and Etorofu. The entry of Soviet troops on Japanese territory was authorized only under the document known as General Order No. 1, the first of the general orders to the Imperial Japanese Government by the Supreme Commander for the Allied Powers carrying out the terms of surrender to him; it embodied an agreement made among the Allied Powers and was, and is, binding upon the Soviet Government as upon the other Allied Powers. That order provided only for the detailed execution of the terms of military surrender of Japanese forces. It provided that the "Kurile Islands" was among various areas (including Manchuria, North Korea and Karafuto) in which Japanese armed forces should surrender to "the Commander-in-Chief of Soviet Forces in the Far East". Other Allied commanders were designated to accept surrender in other specific areas. As the Soviet Government specifically agreed, the order provided that on the main islands of Japan, including the Island of Hokkaido "and the minor islands adjacent thereto", of which territory the Habomai Islands and Shikotan and the islands of Kunashiri and Etorofu were always, and still are, an integral part, Japanese armed forces should surrender to "the Commander-in-Chief, U.S. Army Forces, Pacific". The entire surrender to all Allied forces, including the Soviet forces, and the military occupation which ensued as a result thereof were specifically provided to be pursuant to the surrender to the "Supreme Commander for the Allied Powers", who on behalf of all the Allied Powers accepted Japan's surrender.

General Order No. 1 contained no provision transferring sovereignty from Japan to the Soviet Union or to any other Government in any Japanese territory.

The Soviet Government's action in occupying the Habomai Islands, and Shikotan, and Kunashiri and Etorofu was not authorized by nor in accordance with General Order No. 1 or any agreement of the Soviet Government with the United States Government and other Allied Powers. Its subsequent action of expelling the native Japanese population from these islands and purporting to incorporate the islands as well as other Japanese territory into the Soviet Union without the consent or approval of the Allied Powers and of the Government of Japan constituted internationally illegal conduct as well as further violation of its agreements with the other Allied Powers, particularly as the Soviet Government's claim of title to such territory and the continued presence therein of Soviet authorities was invalid and illegal.

3. In its note of December 11, 1954, the Soviet Government also cites in support of its claim of title a "directive of the staff of the

Supreme Commander for the Allied Powers, MacArthur, of January 29, 1946" by which it is claimed the Habomai Islands "are excluded from the sovereignty of Japan". The United States Government categorically denies that this directive, or any other directive, had any such intention or effect. The directive in question, as a reading of it plainly discloses, was issued by the Supreme Commander for the Allied Powers to the Imperial Japanese Government in performance of the military occupation functions of the Supreme Commander; it was specifically tentative in character and limited in scope; and it contained the following specific provision which the Soviet Government ignores—

"Nothing in this directive shall be construed as an indication of Allied policy relating to the ultimate determination of the minor islands referred to in Article 8 of the Potsdam Declaration."

B. With respect to the Soviet claim of littoral air space:

As has unfortunately been the case in other diplomatic exchanges concerning the Soviet Government's claims of violations of its boundaries, the Soviet Government has failed to state precisely where it claims its boundary runs. The United States Government is compelled to conclude from these experiences that the Soviet Government has deliberately chosen, as a matter of policy, to refuse to make its territorial claims specifically known to the world otherwise than by arbitrary and violent actions such as have characterized Soviet attacks without warning on innocent American aircraft, and the seizure and imprisonment of Japanese fishermen and fishing vessels in the area in question. Lest there be any uncertainty as to the United States Government's position on this subject, therefore, the United States Government takes this opportunity to declare the following:

1. Even if, contrary to the fact and applicable law, the Soviet Government had any legal title, or other legal rights, to the Habomai Islands, such rights could not, in any event, extend on the surface or in the air beyond three nautical miles from the coastlines, following their sinuosities, of each of the land masses. The United States Government refers in this regard to its note of October 9, 1954, on account of a similar incident of Soviet attack on an innocent United States military aircraft over the Sea of Japan.

2. Even if, contrary to the fact and applicable law, the Soviet Government had any legal territorial right whatever in air space or surface space outside the shores of the land masses in the Habomai Islands, such right could in no event be applied or exercised, and such territorial space could not extend, so as to deprive Japan (and the United States Government under the Security Treaty) of the long-established Japanese territorial rights in the waters and air space adjacent to the Island of Hokkaido and other parts of Japan, extending three nautical miles from these Japanese land masses.

3. Even if, contrary to law, the Soviet Government may assert rights or title in derogation to Japan's in the waters and in air space over the Pacific Ocean, the Goyomai Strait, or contiguous waters and air space which, prior to the Soviet Government's unilateral arrogation, constituted waters or air space open to international access, such claim is invalid as to other non-consenting governments and such water and air space could not lawfully be closed to international access by any act of the Soviet Government without the consent of the nations affected thereby. The United States Government has not consented and does not consent to such action by the Soviet Government.

In so far, therefore, as the Soviet Government may claim that any of the actions of the Soviet fighter aircraft directed against the B-29 in the incident of November 7, 1954 took place in air space herein characterized by the United States Government as international air space or Japanese air space, or air space open to international access, the United States Government reiterates that such action was unlawful and subjects the Soviet Government to liability to the United States Government for damages and other amends.

V

The United States has suffered the following items of damage, in direct consequence of the foregoing illegal acts and violations of duty, for which the Soviet Government is responsible, and the United States Government demands that the Soviet Government pay to it the following sums on account thereof:

1. The United States Air Force B-29 airplane, bearing serial number 42-94000, and its contents at the time of its destruction on November 7, 1954, valued in total at \$659,559.04.
2. Other damages to the United States Government, \$37,045.05.
3. Damages to the next of kin, nationals of the United States, for the death of the crew member, Lt. Sigfredo Angulo, \$50,000.00.
4. Damages to the surviving members of the crew of the B-29, all nationals of the United States, \$10,000.00.

TOTAL—\$756,604.09

There has been included in the sum of \$37,045.05, above mentioned, the sum of \$3,749.65 paid by the United States Government *ex gratia* to Japanese nationals on account of injuries suffered by them from the crash of the B-29 on their property in the Island of Hokkaido in direct consequence of the unlawful conduct of the Soviet Government. Should the United States Government be reimbursed, its claim against the Soviet Government will be *pro tanto* reduced.

The United States Government has not included in its demand for damages, specified above, any sum on account of the items of

intangible injury deliberately and intentionally caused to the United States Government and the American people by the wrongful actions of the Soviet Government. In that regard, the United States Government has determined to defer to a later date the formulation of the kind and measure of redress or other action which the Soviet Government should take which would be appropriate in international law and practice to confirm the illegality of the actions directed by the Soviet Government against the United States Government and the American people.

VI

The Government of the United States calls upon the Government of the Union of Soviet Socialist Republics to make its detailed answer to the allegations and demands made in the present communication. Should the Soviet Government in its answer acknowledge its indebtedness on account of the foregoing and agree to pay the damages suffered, the United States Government is prepared, if requested, to present detailed evidence in support of its calculations of damages suffered and alleged.

Accept, Excellency, the renewed assurances of my highest consideration.

Annex 6

NOTE FROM THE SOVIET GOVERNMENT TO THE UNITED STATES GOVERNMENT OF AUGUST 19, 1957

Translated from Russian.

No. 46/OSA.

In connection with the note of the Government of the United States of America, No. 945 of May 23, 1957, the Government of the Union of Soviet Socialist Republics considers it necessary to state the following.

Examining the above-mentioned note of the Government of the USA relating to the incident which took place in connection with the violation by an American four-motored military airplane, B-29, of the state border of the USSR in the region of the island of Tanfilyev (Kurile Islands) on November 7, 1954, the Soviet Government notes that in this note, there is contained nothing new relative to the incident in question in comparison with what the Government of the USA has previously stated on this question. In the note, there is again repeated a version of the incident, contradicting exactly established facts at the disposal of the Soviet Government.

The Soviet Government in its notes of November 7 and December 11, 1954, has already set forth, on the basis of factual data, the conditions of the violation by an American military airplane of the

Soviet state border. Verified factual data show that on November 7, 1954 at 12:41 Vladivostok time, an American military airplane B-29 violated the state border of the USSR in Soviet Strait (Koe-mai-Kaikio) towards the southwest from the shoal of Kaigara-Sendan and penetrated into the airspace of the USSR to the extent of more than 30 kilometers, approximately to a point with coordinates of 146°15' eastern longitude and 43°24' northern latitude. After that, the B-29 airplane turned towards the west, went over the northern extremity of Yuri Island and then over Tanfilyev Islands (Kurile Islands), where it was met by two Soviet interceptors, moving towards it with the intention of indicating that it was located within the limits of the borders of the USSR and of proposing that it immediately leave the airspace of the Soviet Union. On approaching the B-29 airplane the Soviet interceptors were fired at from the side installations of the American airplane, in connection with which they were obliged to open answering fire. Only after this did the violating American airplane quit the airspace of the USSR and depart in a southwesterly direction.

Taking into consideration that the facts of the violation by the above-mentioned American airplane of the state border of the USSR and of the firing by it at the Soviet airplanes are exactly established and that in consequence of this responsibility for the incident in question is placed fully on the American side, the Soviet Government rejects the claim set forth in the note of the Government of the USA of May 23, 1957 as unfounded.

In connection with this, the Soviet Government considers it necessary to note that the assertions contained in the note of the Government of the USA that there are supposedly at the disposition of American authorities proofs of the correctness of their version of the incident with the B-29 airplane are all the more strange in that they are being brought out more than two and a half years after the incident. To assert, in these conditions, for example, that the Government of the USA supposedly possesses "indisputable evidence" that the American airplane allegedly did not open fire on the Soviet airplanes seems, at the very least, frivolous.

As regards the statement of the Government of the USA that supposedly several South Kurile Islands, in the region of which the incident with the American airplane took place, are not Soviet territory, such a statement has no basis, as has already been shown in the note of the Soviet Government of December 11, 1954. Moreover, it is in open contradiction with well known international agreements and documents, signed by official representatives of the United States of America.

It is possible only to add to that which is stated in the note of the Soviet Government of December 11, 1954, that in general there is not, in these documents dealing with territorial questions, and particularly in the Yalta Agreement, which provided for the transfer of the Kurile Islands to the Soviet Union, even one article or one

clause which would single out from the composition of these islands the islands of Shikotan, Habomai, Kunashiri, or Iturup, which are an inseparable, composite part of the Kurile Islands.

The Soviet Government considers the question of the Kurile Islands decided on the basis of the Yalta Agreement and other international agreements and does not consider it necessary to enter into further discussion of arbitrary statements of the Government of the USA on this question.

Inasmuch as, in the note of the Government of the USA, baseless assertions regarding the width of territorial waters defined by the Soviet Union are again repeated, the Soviet Government recalls that its position on this question is well known and that, in particular, it was set forth in an exhaustive manner in the note of the Soviet Government to the Government of the USA of December 31, 1954.

As is clear from the note of the Government of the USA of May 23 of this year, instead of giving a strict order to the Headquarters of the American Air Forces not to permit further violations of the airspace of the Soviet Union, the Government of the USA in every manner attempts to deny the exactly established facts of the violation by American airplanes of the state borders of the USSR, encouraging in this manner, such violations.

In connection with the above-stated, the Soviet Government reaffirms its notes of November 7 and December 11, 1954, and considers it necessary to emphasize that the possibility of repetition of undesired incidents with American airplanes similar to that which took place on November 7, 1954 will be completely excluded if the Government of the USA takes measures for the prohibition of violations by American airplanes of the state borders of the Soviet Union.

Annex 7

NOTE FROM THE UNITED STATES GOVERNMENT TO THE
SOVIET GOVERNMENT OF JUNE 19, 1958

No. 1093.

Excellency:

I have the honor to transmit, upon the instruction of my Government, the following communication from my Government to your Government:

The Government of the United States of America has received and studied the note of the Government of the Union of Soviet Socialist Republics No. 46/OSA of August 19, 1957 delivered to the Embassy of the United States Government in Moscow in reply

to note No. 945 of the United States of America dated May 23, 1957, relating to the destruction on November 7, 1954, by Soviet military aircraft of a United States Air Force B-29 airplane engaged in legitimate and peaceable flight in the area of the Japanese island of Hokkaido.

On the principal issues of fact raised by the prior exchanges of notes between the United States Government and the Soviet Government on this incident, the Soviet Government's new note constitutes no clarification. It does not state where the Soviet Government claims its territorial jurisdiction to begin in the area of the Nemuro Peninsula. It further varies the account given by the Soviet Government in prior communications of the alleged course of flight of the United States Air Force B-29 which was attacked and destroyed over the island of Hokkaido, and it provides no justification for such action.

The Soviet Government has thus categorically taken issue with the United States Government's allegations of fact in prior communications, particularly in note No. 945 of May 23, 1957, and with the legal validity of the United States Government's contentions. The propriety of the conduct of the Soviet fighter aircraft and of Soviet claims to the areas of the Habomai Islands and Shikotan, and to Kunashiri and Etorofu, and their territorial waters remains in dispute. If the Soviet Government also claims any territorial rights in the Goyomai Strait or in the waters adjacent to the Nemuro Peninsula such claims too are disputed. The United States Government denies the Soviet Government's contentions of law and fact and further reasserts that the actions of the Soviet Government against the B-29 aircraft were without warning and unprovoked and, under the circumstances which obtained, illegal.

The United States Government therefore believes, and hereby notifies the Soviet Government that it deems, that an international dispute exists between the two Governments falling within the competence of the International Court of Justice and proposes that the dispute be presented for hearing and decision in the International Court of Justice. Since the Soviet Government has thus far not filed with that Court any declaration of acceptance of the compulsory jurisdiction of that Court, the United States Government invites the Soviet Government to file an appropriate declaration with the Court, or to enter into a Special Agreement, by which the Court may be empowered in accordance with its Statute and Rules to determine the issues of fact and law between the parties. The Soviet Government is requested to inform the United States Government of its intentions with respect to such a declaration or Special Agreement.

Accept, Excellency, the renewed assurances of my highest consideration.