

Collaborative Innovation Center of South China Sea Studies, Nanjing University
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Evidentiary Issues in the South China Sea Arbitration Award and Their Legal Implications

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Authors Huang Yao & Huang Yuanping



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Collaborative Innovation Center of South China Sea Studies

Floor 3, Yifu Building, 22 Hankou Road, Gulou District, Nanjing, Jiangsu Province, 210093
Tel: +86 25-83597212/+86 25-83593123 | Fax: +86 25-83597212 | Web: nanhai.nju.edu.cn

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About the Authors



Huang Yao is professor of the Law School of Sun Yat-sen University in China. She is chief expert of the Marine Policy and Law Innovation Team at the Southern Marine Science and Engineering Guangdong Laboratory (Zhuhai), and Director of the Center for Ocean Law Studies of Sun Yat-sen University. She has a Ph.D. in law from Peking University. Professor Huang's research covers the following fields: international legal theory, law of the sea, use of force, law of international organizations. She has published the following monographs in Chinese: *Sovereignty and Maritime Rights in the South China Sea: A Jurisprudential Study* (2023), *The South China Sea Arbitration Awards: Legal Analysis of Core Issues* (2018), *The Comprehensive Convention against Terrorism of the United Nations: A Study from the Perspective of International Law* (2010), *On the Principle of Prohibition of Force: Jurisprudential Analysis of Article 2(4) of the United Nations Charter* (2003).

Email: lpshyao@mail.sysu.edu.cn



Huang Yuanping is a Ph.D. candidate of the Law School of Sun Yat-sen University.

Email: huangyp76@mail2.sysu.edu.cn

Huang Yuanping

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Executive Summary

The determination in the 2016 South China Sea Arbitration Award ("the Award") concerning the legal status of the relevant maritime features of Nansha Qundao (Spratly Islands) is one of the most widely questioned conclusions in the Award. This article focuses on the treatment of evidence by the arbitral tribunal ("the Tribunal") in applying Article 121(1) and (3) of the *United Nations Convention on the Law of the Sea*. Drawing on general principles concerning the admission and evaluation of evidence in international law, relevant case law of the International Court of Justice (ICJ), and the Tribunal's Rules of Procedure, it compares the evidentiary standards used in determining whether maritime features constitute "high-tide features" and "rocks." The study finds that, when applying Article 121(1), the Tribunal attached importance to the relevance, reliability, and probative value of evidence, as well as corroboration among different items of evidence. When applying paragraph 3, however, it shifted without reasonable explanation to an evidentiary approach centered on historical materials, failed adequately to examine contemporary evidence and contrary materials, and drew determinative factual inferences despite insufficient evidence. These practices resulted in inconsistent evidentiary standards, exceeded the bounds of reasonable discretion, and left the determinations concerning the legal status of the relevant maritime features without a sufficient and coherent factual basis. The conclusions of the Award derived from those determinations are difficult to sustain and should have no legal effect.

› Key Points

- General principles concerning evidence in international law, relevant ICJ practice, and the Tribunal's Rules of Procedure require adjudicative bodies to apply an appropriate standard of proof and to evaluate evidence comprehensively in light of its relevance, reliability, and probative value. The Tribunal largely followed these requirements when applying Article 121(1).
- In applying Article 121(3), the Tribunal departed from this approach without reasonable explanation, relied excessively on historical materials, diminished or even excluded the probative role of contemporary evidence, and failed to assess conflicting evidence as a whole. This resulted in inconsistent evidentiary standards.
- Given China's non-acceptance of and non-participation in the arbitration, the Tribunal should have subjected the factual basis of the claims to heightened scrutiny. Instead, in determining the legal status of the maritime features, it relied selectively on evidence and made inferential leaps, exceeding the bounds of reasonable discretion and producing conclusions inconsistent with objective facts.

Introduction

The 2016 Award on the Merits in the South China Sea Arbitration, which was unilaterally initiated by the Philippines, has been widely questioned for its determinations concerning the legal status of the relevant maritime features of Nansha Qundao. Existing scholarship has identified problems in the Award chiefly in relation to the interpretation of Article 121 of the *United Nations Convention on the Law of the Sea* (hereinafter "the Convention"), arbitral jurisdiction, and procedural legitimacy.¹ Other studies have shown that, in its treatment of evidence, the Tribunal violated the principle that the burden of proof rests on the party making an assertion, collected evidence in place of the Philippines, accepted materials submitted out of time, and relied on evidence lacking relevance or probative value. By comparison, whether the Tribunal employed consistent standards of evidentiary evaluation in applying paragraphs 1 and 3 of Article 121 warrants further systematic examination.

The admission and evaluation of evidence is the process by which an adjudicative body, under applicable rules, determines whether materials are admissible, what probative value they carry, and whether they support the fact to be proved. It therefore concerns admissibility as well as the relevance, reliability, and evidentiary weight of the materials. Focusing on the Tribunal's treatment of evidence under Article 121(1) and (3), this article draws on general principles of international law, relevant ICJ practice, and the Tribunal's Rules of Procedure to compare the Tribunal's methods of evidentiary evaluation in relation to different questions of fact. It then assesses whether the Tribunal's factual findings satisfied the requirement under Annex VII of the Convention that, in proceedings involving the non-appearance of a party, the claim be well founded in fact and law.

This article argues that relevant ICJ practice provides useful evidentiary standards for determining the legal status of maritime features. In applying Article 121(1) to determine whether a feature is above water at high tide, the Tribunal in fact accepted and applied those standards. In applying paragraph 3 of the same Article to determine whether a feature can sustain human habitation or economic life of its own, however, the Tribunal departed from its earlier approach without reasonable explanation. This shift in evidentiary standards directly undermined the reliability of its fact-finding and deprived the Award's conclusions of an adequate factual basis.

1 See Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, *Chinese Journal of International Law*, 2018, Vol. 17, Issue. 2, pp. 632-648.

General Principles and Judicial Practice Governing the Admission and Evaluation of Evidence in Determining the Legal Status of Maritime Features

As a general matter, the written rules on evidence and proof governing international courts and arbitral tribunals are relatively sparse, and such bodies enjoy broad discretion in admitting and evaluating evidence. Free evaluation of evidence, however, does not permit the arbitrary selection or rejection of evidence. The principles of good faith, the fair administration of justice, and equality of the parties all require an adjudicative body to evaluate evidence neutrally and consistently; the use of markedly different evidentiary standards for comparable questions of fact requires adequate justification.

In international judicial practice, evidentiary evaluation generally involves three interrelated dimensions: first, the burden of proof, which in principle rests on the party asserting a fact; second, admissibility, namely whether the material may be received as evidence; and third, probative value, namely the extent to which the evidence supports the fact to be established. While applying the *free evaluation of evidence*, the ICJ ordinarily considers relevance, reliability, objectivity or neutrality, and the source and process by which the evidence was produced. Whether evidence is mutually corroborative is also important to determining whether a fact has been established.

Although the ICJ is not bound by a strict doctrine of *stare decisis*, considerations of judicial continuity and predictability generally lead it to maintain basic consistency on procedural matters, including evidentiary rules; departure is justified only where continued adherence to prior practice might produce manifest injustice. This requirement is even more important when one party does not appear. Article 9 of Annex VII to the Convention provides that, before making its award, an arbitral tribunal must satisfy itself not only that it has jurisdiction but also that the claim is well founded in fact and law.² China's non-acceptance of and non-participation in the arbitration therefore did not permit the Tribunal to lower

2 Article 9 of Annex VII to UNCLOS provides: "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."

the standard of proof. On the contrary, it required the Tribunal to verify more carefully and comprehensively materials submitted unilaterally or collected on its own initiative. The provisions of the Tribunal's *Rules of Procedure* concerning non-appearance embody the same requirement.³

Scholarly opinion differs as to whether the standard applicable in proceedings involving the non-appearance of a party should be "beyond reasonable doubt" or a "preponderance of the evidence." Whatever the formulation, factual conclusions must at least be supported by evidence that is reasonably sufficient and points, viewed as a whole, in the same direction. Where materials are ambiguous, of doubtful provenance, or mutually inconsistent, an adjudicative body should not derive a determinative conclusion from a single item, but should assess the evidentiary record as a whole.

With respect to the legal status of maritime features under Article 121 of the Convention, the International Tribunal for the Law of the Sea (ITLOS) has not yet decided a case involving the direct and systematic application of that provision to determine such status. Apart from the South China Sea Arbitration, practice in Annex VII arbitration is likewise limited. The ICJ's treatment of evidence in relevant territorial and maritime disputes therefore provides an important point of reference, notably in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, decided in 2001, and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, decided in 2012.

In the *Qatar v. Bahrain* case, both parties submitted historical materials and expert opinions. The ICJ did not respond item by item to all the material, but focused on comparing the foundations of the parties' expert opinions and their relationship to one another. Because Qatar's expert opinion neither adequately refuted Bahrain's nor advanced reasoning sufficient to support a contrary conclusion, the Court ultimately accepted those parts supported by the available evidence.⁴ This approach indicates that, where the evidence diverges, the Court tends to rely on material that has been verified and not effectively rebutted, rather than extend its inferences where evidence is insufficient.

In *Nicaragua v. Colombia*, the parties submitted historical materials, nautical charts,

3 Article 25 of Rules of Procedure provides: "1. Pursuant to Article 9 of Annex VII to the Convention, if one of the Parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case, the other Party may request the Arbitral Tribunal to continue the proceedings and to make its award. Absence of a Party or failure of a Party to defend its case shall not constitute a bar to the proceedings. Before making its award, the Arbitral Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."

4 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, I.C.J. Reports 2001, pp. 99-100, paras. 195-197.

and expert field-survey reports. The ICJ treated with caution older materials only weakly connected to the fact to be established and observed that the principal function of nautical charts is to promote navigational safety, which limits their probative value in determining the legal status of maritime features. By contrast, the Court gave greater weight to contemporary evidence based on field observations and scientific assessment, while still testing the conclusions of expert reports by comparing the parties' respective verification results.⁵

Three evidentiary approaches may be distilled from these cases. First, material manifestly lacking relevance or reliability should not be accorded determinative weight. Second, in comparing probative value, greater weight should in principle be given to evidence that is temporally proximate to the fact to be established and whose process of production is transparent and verifiable. Third, when evidence conflicts, priority should be given to elements that corroborate one another, have not been effectively challenged, or are accepted by both parties. These approaches are consistent with the basic evidentiary requirements in the Tribunal's Rules of Procedure and provide a benchmark for assessing whether its admission and evaluation of evidence was internally consistent.⁶

5 Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, pp.644-645, paras. 35-37.

6 Article 22 of Rules of Procedure provides: "1. Each Party shall have the burden of proving the facts relied on to support its claim or defence. 2. The Arbitral Tribunal may take all appropriate measures in order to establish the facts including, when necessary, the conduct of a visit to the localities to which the case relates. The Parties shall afford the Arbitral Tribunal all reasonable facilities in the event of such a visit. 3. Written pleadings shall be accompanied by all documents and other evidence relied upon in support of any facts alleged therein. In so far as is possible, all documentary evidence shall be submitted with the respective Memorial and Counter-Memorial of the Parties. 4. Pursuant to Article 6 of Annex VII to the Convention, the Arbitral Tribunal may, at any time during the arbitral proceedings, require the Parties to produce documents, exhibits or other evidence within such a period of time as the Arbitral Tribunal shall determine. 5. The Parties shall include with their written pleadings written witness or expert opinion testimony for each witness of fact or expert witness upon which they intend to rely. 6. Witnesses, including expert witnesses, who are presented by the Parties to testify to the Arbitral Tribunal may be any individual, notwithstanding that the individual is in any way related to a Party to the arbitration. 7. The Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence adduced."

Inconsistencies in the Tribunal's Admission and Evaluation of Evidence in Determining the Legal Status of Maritime Features

In the South China Sea Arbitration, the Philippines advanced Submissions Nos. 3 to 7 in relation to ten maritime features, but the Award addressed far more than those features. The Tribunal extended its inquiry to the so-called "high-tide features" of Nansha Qundao as a whole and, on that basis, determined whether they could generate an exclusive economic zone and continental shelf. To understand its treatment of evidence, it is first necessary to outline the analytical approach it adopted.

In addition to the term "low-tide elevation" used in the Convention, the Tribunal employed the expressions "high-tide features" and "submerged features," and further divided high-tide features into "rocks" and "fully entitled islands." It adopted a two-step approach. First, it applied Article 121(1) to determine whether the relevant feature was above water at high tide. Second, it applied paragraph 3 to determine whether a feature already classified as a high-tide feature could sustain human habitation or economic life of its own.

At the second step, the Tribunal did not examine every feature of Nansha Qundao individually. Instead, it selected six of the larger features, including Taiping Dao (Itu Aba Island), for assessment. Its reasoning was that, if even these larger features were "rocks" incapable of generating an exclusive economic zone or continental shelf, smaller features could not enjoy more extensive maritime entitlements. This reasoning made the evaluation of evidence concerning the six features pivotal to the legal-status determination for Nansha Qundao as a whole.

By source, the evidence relied on by the Tribunal fell broadly into three categories. The first comprised satellite imagery, nautical charts, sailing directions, nautical manuals, historical and anthropological materials, and geographic and hydrographic data submitted by the Philippines, including through supplementary submissions. The second comprised public statements and diplomatic correspondence of the Chinese Government, together with nautical charts and sailing directions published by China, which the Tribunal included in its review although China had not itself submitted them. The third comprised British and Japanese survey and mapping materials and relevant French archival materials collected by the Tribunal on its own initiative. By type, the evidence consisted chiefly of documentary and expert evidence, with historical evidence accounting for a substantial portion of the

documentary record. The following sections compare the Tribunal's different treatment of these materials under paragraphs 1 and 3 of Article 121.

A. Application of Article 121(1): Emphasis on Recent Evidence and Mutual Corroboration

The fact to be established under Article 121(1) was whether the relevant feature was above water at high tide. For the ten features covered by the Philippines' Submissions, the Tribunal mainly examined satellite imagery, nautical charts, survey records, and sailing directions. It considered satellite imagery insufficiently precise to establish a feature's condition at high tide on its own and therefore turned to other materials. Because the charts submitted by the Philippines likewise did not provide adequate information, and because some of the original fair charts of surveys conducted on the features had not been provided, the Tribunal also sought out British survey materials dating from the 1860s and Japanese survey materials dating from the 1930s.⁷

In comparing the probative value of different items of evidence, the Tribunal plainly attached importance to more recent materials. With respect to Ximen Jiao (McKenna Reef), for example, earlier British and Japanese materials did not identify Ximen Jiao as a high-tide feature, whereas a 2005 Chinese nautical chart contained information indicating that Ximen Jiao was above water at high tide. The Tribunal accordingly concluded that the Chinese chart "is to be preferred as the more recent evidence."⁸

The Tribunal also emphasized corroboration where the evidence conflicted. With respect to Dongmen Jiao (Hughes Reef), for example, a Japanese nautical chart marked it as a high-tide feature, but Chinese charts did not contain the same designation and no other evidence supported it. The Tribunal therefore declined to make a finding on the basis of the Japanese chart alone.⁹ A similar approach appears in its examination of other features.

Thus, in applying Article 121(1), the Tribunal followed at least two relatively cautious evidentiary methods: it compared when the evidence was produced and gave weight to more recent materials; and, where evidence conflicted, it required key conclusions to be corroborated by evidence from different sources. These methods were broadly consistent with relevant ICJ practice and provide a reference point for evaluating the Tribunal's treatment of evidence under paragraph 3.

B. Application of Article 121(3): A Substantive Shift in Evidentiary Standards

In examining whether the relevant features possessed the "capacity to sustain human habitation or economic life of their own" (hereinafter, the "sustaining capacity"), the Tribunal

⁷ South China Sea Arbitration, Award, Judgment of 12 July 2016, paras. 326, 329-331.

⁸ South China Sea Arbitration, Award, Judgment of 12 July 2016, para. 354.

⁹ South China Sea Arbitration, Award, Judgment of 12 July 2016, para. 358.

employed an evidentiary approach markedly different from that used under paragraph 1. The principal differences lay in its excessive reliance on historical materials and its failure to assess the entire evidentiary record comprehensively.

First, the Tribunal accorded excessive probative value to historical evidence and effectively excluded contemporary evidence from meaningful consideration. It considered the relevant features of Nansha Qundao to have undergone "significant human modification" and regarded historical records as more informative of their natural condition than materials reflecting current conditions. It therefore adopted the "best available evidence of the previous status" as a criterion for selecting evidence and, on that basis, admitted a large body of historical documents.¹⁰ The difficulty is that this criterion was neither applied consistently nor adequately justified.

In applying paragraph 1, the Tribunal had likewise invoked "significant human modification" as a reason to seek materials reflecting the features' original condition, but it did not then exclude contemporary evidence. On the contrary, it relied on more recent Chinese charts to reject or revise earlier survey materials. Under paragraph 3, however, the Tribunal turned primarily to a limited historical record and failed to conduct a substantive examination of materials concerning the contemporary condition of Taiping Dao submitted as an *amicus curiae* submission by relevant parties in the Taiwan region. The same rationale thus produced diametrically different evidentiary consequences at the two stages, for which the Tribunal offered no reasonable explanation.

Historical materials do not necessarily have greater probative value than contemporary evidence. The Tribunal's "static interpretation" effectively assumed that a maritime feature's sustaining capacity was fixed at a particular point in history and would not change with the environment, technology, or human activity. That assumption is difficult to sustain. The natural conditions of maritime features may change as a result of climatic and ecological shifts, while patterns of human use may also evolve with technological progress and social development. Historical materials can illuminate conditions during a particular period, but cannot automatically substitute for an examination of contemporary conditions. Scholars including Yoshifumi Tanaka and Jonathan I. Charney have observed that a maritime feature's sustaining capacity may vary over time;¹¹ Irini Papanicolopulu has criticized this approach for "freezing" the Convention's rules in the past and disregarding the influence of

10 South China Sea Arbitration, Award, Judgment of 12 July 2016, para. 306.

11 See Yoshifumi Tanaka, Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits), *Ocean Development and International Law*, 2017, Vol. 48, Issue 3-4, p. 369; Jonathan I. Charney, Rocks that Cannot Sustain Human Habitation, *American Journal of International Law*, 1999, Vol. 93, Issue 4, pp. 867-868.

technological progress and State practice on the interpretation of its provisions.¹²

The facts to be established under paragraphs 1 and 3 of Article 121 also differ. Paragraph 1 concerns whether a feature is above water at high tide and principally reflects its natural physical characteristics. Paragraph 3 concerns "human habitation" and "economic life" and thus inevitably encompasses human use and socioeconomic factors. Consequently, even if contemporary evidence must be evaluated with caution because of human modification, that does not justify excluding it wholesale. Moreover, the historical materials admitted by the Tribunal themselves contained information, such as the introduction of non-native crops, showing how human activity had altered ecological conditions.

In addition, the Tribunal did not clearly define "significant human modification," but merely cited examples in which the construction of supporting facilities and rudimentary airstrips altered the physical form of the features. Such changes bear a relatively direct relationship to the physical condition addressed by paragraph 1. Yet the Tribunal articulated no workable standard for determining what kind or degree of modification would render contemporary evidence unreliable as a measure of a feature's sustaining capacity for purposes of paragraph 3. Without distinguishing the type and degree of modification and its relationship to the fact to be established, the Tribunal could not reasonably use modification as a basis for rejecting contemporary evidence in its entirety.

Second, the Tribunal did not assess the entire evidentiary record comprehensively, and some of its factual inferences exceeded what the evidence could support. With respect to Taiping Dao, for example, the Tribunal examined materials from the United Kingdom, Japan, France, China, and other sources across five dimensions: fresh water, vegetation, soil, fishermen, and commercial activity.¹³ Taken as a whole, the evidence indicated that Taiping Dao possessed some capacity to sustain human habitation or economic life of its own. The Tribunal nevertheless characterized that capacity as "limited," without specifying the criterion by which it was deemed limited or explaining why such a characterization was sufficient to negate the capacity required by paragraph 3.

Regarding the "presence of fishermen," the Tribunal found that only a limited number of persons had made a livelihood there. Yet only two of the cited materials provided specific figures—four and five persons, respectively—while other materials used terms such as "a majority" and "many" or listed multiple persons of different nationalities.¹⁴ The evidence itself therefore yielded no clear and consistent numerical conclusion. The Tribunal nevertheless

¹² See Irini Papanicolopulu, *The Land Dominates the Sea, Questions of International Law: Zoom-in*, 2018, Vol. 47, p. 47.

¹³ South China Sea Arbitration, Award, Judgment of 12 July 2016, paras. 580-614.

¹⁴ South China Sea Arbitration, Award, Judgment of 12 July 2016, paras. 598-601.

relied on it to make a determinative assessment, even though the chain of inference was insufficient.

The Tribunal also repeatedly used formulations such as "there is no evidence that ..." to move directly from "not sufficiently proved" to "the fact did not exist." For example, it found no evidence that the long-term absence of human habitation on Nansha Qundao resulted from intervening forces, even though materials before it referred to the French occupation of Taiping Dao in 1933, Japan's occupation during the Second World War, and the bombing of Taiping Dao.¹⁵ These external events may at least have affected the continuity of habitation and should therefore have formed part of the causal analysis rather than been excluded from the evidentiary assessment.

Similarly, an *amicus curiae* submission filed by relevant parties in the Taiwan region in March 2016 listed 39 items of evidence, including survey reports on geology, soil, water quality, and vegetation, to demonstrate that Taiping Dao had the conditions necessary to sustain human habitation and economic life of its own.¹⁶ The Tribunal ultimately referred only to the Philippines' position on the submission. It neither addressed the materials substantively nor explained why it declined to consider or rely on them. Faced with contrary evidence capable of affecting the outcome, silence cannot substitute for evidentiary examination.

When evidence conflicts, international adjudicative bodies generally compare its source, mode of production, and reliability, and give priority to portions that corroborate one another or have not been effectively challenged. In cases of non-appearance, Article 9 of Annex VII to the Convention and the Tribunal's Rules of Procedure do not lower the evidentiary threshold; they require the Tribunal affirmatively to satisfy itself that the claims are well founded in fact and law. Yet the Tribunal drew key factual inferences while relying selectively on the evidence and without comprehensively evaluating the materials already before it. Those inferences were not only insufficiently supported by evidence but also marked by evident leaps in reasoning.

15 South China Sea Arbitration, Award, Judgment of 12 July 2016, paras. 608, 612, 622.

16 Research Group on the South China Sea Arbitration of China Law Society, "Research Report on Evidence in the South China Sea Arbitration" [in Chinese], China Law Society, July 8, 2016, <https://www.chinalaw.org.cn/portal/article/index/id/20574.html> (accessed July 24, 2024).

Conclusion

In sum, when applying Article 121(1) of the Convention, the Tribunal gave weight to more recent evidence, relevance, and corroboration among materials from different sources. When applying paragraph 3, however, it shifted without adequate explanation to an evidentiary approach centered on historical materials, diminished or even excluded contemporary evidence, failed to assess conflicting materials comprehensively, and repeatedly inferred that a fact did not exist merely because evidence was lacking. This shift undermined the consistency of the Tribunal's adjudicative method and failed to satisfy the careful scrutiny required when one party does not appear. The conclusions concerning the legal status of Taiping Dao and other maritime features lack a sufficient and coherent factual basis and exceed the bounds of reasonable discretion. The conclusions reached in the Award on that basis are difficult to sustain and should have no legal effect.

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Address: Floor 3, Yifu Building, 22 Hankou Road, Gulou District, Nanjing, Jiangsu Province

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