

*Book Review*

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## **Book Review of Isaac B. Kardon, *China's Law of the Sea: The New Rules of Maritime Order***

**Hongyan Li and Xidi Chen \***

School of Law, Tsinghua University, 100084 Beijing, China

\* Correspondence: cxd21@mails.tsinghua.edu.cn

The reviewed book is Isaac B. Kardon, *China's Law of the Sea: The New Rules of Maritime Order*, Yale University Press, 2023, ISBN 9780300271546 (Online) 9780300256475 (Print). As implied by the title, this book specifically examines China's approach to the law of the sea. It serves as the first comprehensive treatise that analyzes China's marine disputes from the perspectives of both international law and geopolitics. The author endeavors to evaluate the impact of China's practices on the rules of the law of the sea in local, regional,<sup>1</sup> and global contexts. The primary objective of the book is to determine whether China is challenging the existing maritime order or simply altering specific rules. Divided into six chapters, the book explores China's domestic laws and policies concerning defense, exploitation, research, management, surveying, and patrolling in its nearby seas, particularly in disputed waters. It covers topics such as geographic regulations, resource rules, navigation requirements, and dispute resolution rules. Special attention is given to the reactions of states specially affected by these practices, as the author argues that their responses are crucial in assessing the potential normative effects of China's preferred rules.

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Chapter 1 lays the theoretical framework for the ensuing analysis. Kardon emphasizes that the international order is built upon the rules of international law, and the examination of the dynamic maritime order relies on the study of state practices related to the law of the sea (pp. 12-13). Consequently, the author narrows the focus to Chinese practices and examines the responses of states specially affected by them in subsequent chapters. Chapter 2 offers a comprehensive historical overview, highlighting the transformation of China's attitude towards international law. During the nineteenth century, due to tumultuous encounters with British gunboats and European treaties, China viewed international law as a weapon (p. 10). However, in modern times, China's active involvement in the development of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) is significant for its role-changing, as demonstrated by its domestic maritime legal and administrative framework (pp. 50-55).

Chapters 3-6 employ a consistent research methodology and argumentative approach. Each chapter begins by examining China's practices, assessing their uniformity and consistency concerning specific rules. Subsequently, these chapters explore the attitudes of states specially affected by these practices and investigate whether China's preferred rules have broader applicability. The empirical foundation for these chapters comprises a range of materials, from domestic laws to marine policies.

Chapter 3 delves into China's geographic rules, focusing on entitlements, baselines, and boundaries. The author explains that an entitlement represents a state's right to claim a defined breadth for the maritime zones projected from coastal baselines, which are closely linked to boundary delimitation (p. 74). Disputes regarding entitlements mainly center on marine features. China's practice does not exclude "low-tide elevations" from generating sovereign entitlements (p. 79). Vietnam, the Philippines, Indonesia, and Malaysia have officially opposed China's entitlement claims (p. 87). Thus, Kardon concludes that the practices in the Southeast Asia region do not support China's favored norm of obtaining full entitlements from "rocks" and "low-tide elevations." Moreover, the author argues that China favors the universal application of straight baselines as one of its rules for baselines (p. 89). China's practice of drawing straight baselines is consistently observed around its mainland territory but becomes notably non-uniform further offshore. The methods employed to draw baselines in the Xisha/Paracel Islands and Diaoyu/Senkaku Islands are different from Kardon's observations. In the Xisha/Paracel Islands, China links the outermost points of the entire island group, even though they are geographically clustered in two separate groups. In the Diaoyu/Senkaku case, two distinct sets of straight baselines enclose two clusters of islands (p. 90). Another rule examined is the enclosure of groups of offshore islands within a single set of baselines, which the author sees as the most distinctive and potentially rule-altering aspect of China's baseline practice (p. 91). Consequently, China's baseline practice warrants further investigation into the general practices of coastal states (p. 98). Additionally, China's preferred

rules for maritime boundary delimitation include the equitable principle over equidistance, the attribution of full effects to islands facing the mainland coastline, and the establishment of provisional boundaries based on the "nine-dash line." According to Kardon, the geographical uniqueness of the South China Sea, East China Sea, and Yellow Sea explains China's non-uniform territorial claims and necessitates different delimitation rules for different potential boundaries (p. 108). Tangible evidence substantiating these claims includes the Sino-Vietnamese partial boundary, the "nine-dash line" potential boundary, the Natuna "Carveout," and the concept of natural prolongation in the Yellow and East China Seas (pp. 101-105). The diverse boundary claims asserted by China in these regions prompt objections from states particularly impacted by these assertions. The potential for China's preferred rules to be recognized as local or regional custom is limited to circumstances in the East China Sea (p. 114).

Chapter 4 explores the regulatory framework governing the allocation of rights to marine resources. In the South China Sea, China uniformly applies its practice of historic rights, specifically emphasizing their application to fisheries and navigation. Based on predominantly post-2009 records, the author concludes that China's claim regarding historic rights lacks an essential element of acquiescence from the states specially affected (pp. 129-132). China's strategy to asserting exclusive fishing rights in all "sea areas under the People's Republic of China (PRC) jurisdiction" is primarily demonstrated through fisheries law enforcement measures, exemplified by the implementation of "summer fishing bans" and the revitalization of production in the Nansha/Spratly Islands (pp. 136-137). Another principle favored by China concerns traditional fishing rights, which grant non-exclusive access within foreign jurisdictional zones. However, the author observes that the states specially affected generally oppose either of these claims (pp. 148 & 152). Furthermore, this chapter scrutinizes the regulations pertaining to hydrocarbon development. Kardon notes that China's hydrocarbon production, as well as its stance on foreign production in the East China Sea and South China Sea, aligns with provisional median lines, reflecting an implicit recognition. This undermines the uniformity of China's preferred rule, indicating that the natural prolongation of continental shelf rights supersedes the exclusive economic zone (EEZ), with very few exceptions (pp. 157-158). Additionally, China asserts exclusive hydrocarbon rights in all "sea areas under PRC jurisdiction" (pp. 153-154). Moreover, Kardon highlights China's improved maritime law enforcement capabilities and the "increasing precision" in its domestic laws, regarding them as the foundation for China's preferential right to exercise veto jurisdiction over the execution of development projects in disputed areas (p. 168).

Chapter 5 analyzes the rules governing navigation. China's preferred navigational rules stem from an expansive interpretation of sovereignty of the coastal state, serving as their fundamental principle (p. 172). China consistently requires prior authorization for the innocent passage of foreign

warships through its territorial seas. China will exercise the right of innocent passage for vessels of the People's Liberation Army Navy (PLAN) in foreign territorial seas if the corresponding prohibition is not stipulated in the coastal state's domestic law. However, there are two exceptions related to incidents with Japan in 2004 and 2016 (p. 180). Nonetheless, the author reveals that a regional custom permitting coastal states to restrict the innocent passage of warships may indeed exist in East Asia, despite continuous objections from the United States (p. 184). The author observes a lack of uniformity or consistency in China's implementation of rules such as "EEZ military survey regulated as marine scientific research," "restricted overflight," and "restricted Taiwan Strait transit." Concerning the rule of "restricted EEZ military exercises," unauthorized PLAN navigation and exercises in foreign EEZs undermine its uniform application. For example, the PLAN has conducted operations within the EEZs surrounding the US territory of Guam and the state of Hawaii since 2012 (pp. 198-199). While military freedom of navigation is limited, commercial navigation remains largely unhindered (p. 209). This chapter ultimately suggests that the current maritime order maintains equilibrium due to China's consideration of commercial interests (pp. 209-210).

Chapter 6 centers on the rules governing dispute resolution. Concerning UNCLOS dispute resolution rules, China tends to limit the breadth of compulsory dispute resolution mechanisms. A blanket sovereign exemption applies to all disputes over sovereignty involving China and their associated maritime disputes. These preferred rules by China demonstrate uniformity and consistency, particularly evident in the South China Sea Arbitration. According to this chapter, most states have refrained from issuing statements on the award, while twelve states, including Afghanistan, Kenya, and Pakistan, have officially dismissed the tribunal as illegitimate (p. 230). China's normal approach in matters related to sovereign-adjacent marine affairs is to pursue bilateral "dialogue and consultation." Except for the Philippines and Vietnam, all other states specially affected prefer to settle disputes through bilateral negotiations, without resorting to third-party dispute resolution mechanisms (p. 245). The author observes China's tendency to consider effective control of islands as a basis for denying the existence of a dispute (p. 253). Pertinent cases include the Philippines' claims in the South China Sea Arbitration and China's blanket non-recognition of the dispute with Vietnam over the Paracel Islands (pp. 246-247).

The book concludes with a discussion on the future of maritime order in East Asia. China's law of the sea has developed a distinct form, relying on customary international law where possible and exceptionalism where necessary (p. 258). The author argues that China's practices have not been consistently uniform. Although China's capacity to alter global legal norms is generally restricted, its impact on the maritime order in East Asia is evident (p. 258). The region exhibits a maritime order that emphasizes the supremacy of state sovereignty (p. 269).

Overall, this book provides valuable insights into China's law of the sea and the maritime order in East Asia through a comprehensive study of domestic laws, official statements, and management policies concerning China's marine disputes. The author utilizes a multidisciplinary approach integrating geopolitics and international law to examine the claims of coastal states, other relevant claimants, and their perspectives on China's law of the sea. As a scholar specializing in government and contemporary Chinese studies, the author integrates political considerations into the analysis of each specific rule. This is apparent through the inclusion of statements from national leaders and diplomatic officials at the onset of each chapter. While the book focuses on political factors, it does not undermine its legal nature. On the contrary, it provides a deep and thorough analysis of international law of the sea, including relevant cases and events. Prior to assessing China's implementation of particular rules, the author introduces general rules and basic concepts in international law of the sea, such as UNCLOS, to assist readers at all levels who may not be familiar with the subject matter.

Another noteworthy aspect of the book is its focused approach, delving into the field of the law of the sea. However, its significance lies in providing insights into China's impact on international law and the international order. The author recognizes that rule-related disputes may appear to be questions of interpretation and application but fundamentally require answers to critical questions: Who is responsible for making international law? Is China altering or even creating rules, and if yes, how and to what extent? This research approach sheds light on examining Chinese initiatives and discourse in other areas, such as investment, human rights, and the environment, facilitating the assessment of China's impact on the international order. Furthermore, this approach serves as a valuable resource for scholars studying the "rules-based international order" promoted by the United States.

A third notable aspect is the book's extensive use of primary source material. It extensively summarizes China's implementation of specific rules, encompassing domestic laws, diplomatic statements, policy documents, and other materials, providing a wealth of information throughout the text. This rich array of firsthand material addresses the common criticism of excessive focus on politics and insufficient attention to legal aspects in this research field.

However, despite its value, the book also exhibits limitations. The author implies that China is downplaying the significance of rules for its maritime goals (pp. 5-6 & 257-258), yet this evaluation is neither precise nor equitable. As with any sovereign state, China's actions are guided by its national interests, indicative of its power and status. China has the right to establish legal stances that harmonize with its interests, without necessarily undermining the importance and effectiveness of existing rules. For instance, interpreting and applying (or not applying) rules within treaty frameworks according to its interests should not automatically be seen as efforts to undermine existing rules. Consider China's responses to the South China

Sea Arbitration awards, for instance. China's non-acceptance and non-recognition of the awards was based on its declaration of reservation under Article 298 and its interpretation that the Philippines' claims related to the nine-dash line fell within the scope of the reservation concerning historic bays and titles as well as maritime boundary delimitation substantially [1,2]. Although China's reservation and interpretation were in line with its national interests, neither of them was beyond the framework of UNCLOS and applicable customary rules.

Furthermore, the book overlooks China's recent declarations on real multilateralism and its pursuit of a community with a shared future for mankind, which have been mentioned repeatedly by President Xi Jinping and officially published by the State Council of China [3–6]. These are essential for achieving a comprehensive and objective comprehension of China's role as a major player in advocating global governance system reform and international rule-making processes. A conclusion that excessively emphasizes China's regard for state interests over these broader concerns may exhibit bias. The book's overall tone emphasizes the decisive role of marine objectives and interests in China's practice, as explicitly delineated in the Introduction and Conclusion sections (pp. 5-6 & 258-265). This issue is also noticeable in the concentration on specific rules in Chapters 3-6, which observe China's practices and the practices of other states with opposing claims or interests, while disregarding China's efforts in adhering to the path of "pursuing joint development while setting aside disputes" in the South China Sea, such as China-ASEAN Comprehensive Strategic Partnership, as well as the East Asian Marine Cooperation Platform. Additionally, China consistently advocates resolving disputes in the South China Sea through direct negotiation and consultation among the concerned States. These initiatives are equally crucial for analyzing China's role in shaping the maritime order.

The second concern relates to the inadequate and incomplete utilization of reference materials. An evident manifestation is the superficial treatment of provisions within UNCLOS. UNCLOS has been widely regarded as the legal framework for activities at sea, and China consistently upholds and supports its authority. On the other hand, UNCLOS is the product of a compromise by the international community, where some of the rules are open to interpretation, especially those discussed in this book. However, Kardon makes a rigid comparison between China's practices and the black letters of UNCLOS, and consequently concludes that China is violating and diminishing the authority of UNCLOS rules, without any consideration of its inherent defects. As stated in its preamble, UNCLOS cannot resolve all kinds of matters relating to oceans and seas, and general international law provides another independent regime to address those unregulated matters such as historic rights and mid-oceanic archipelago [7]. Take the South China Sea Arbitration as an example, claims held by China to islands and adjacent waters within the dashed line are rooted in its historic rights, which should be adjudicated according to general international law. Because of this,

some scholars argued that it was erroneous for the tribunal to entirely adjudicate the dispute within the framework of UNCLOS [8–11].

Besides, some materials are lack of objectivity. Utilize the content pertaining to historical rights found in Chapter 4 for illustrative purposes. Kardon presents statements of coastal states to argue their consistent objection to China's claim, most of which was mounted after 2009. Despite the author regarding the year 2009 as the point where China formally published the nine-dash line map, there is no mention of the map published in 1948. It's worth clarifying that a map of the South China Sea from China to the Secretary-General of the United Nations was attached to a May 7, 2009 note verbale protesting an extended continental shelf declaration by Vietnam. Thus, there may be a reversal of logical sequence. Additionally, the persuasiveness of the conclusion is debatable as the author does not present any statements made by coastal states before they expressed clear acquiescence [12]. The use of China's statements, position papers, and speeches of Chinese leaders or officials is another example. As in the words of Yang Jiechi cited by Kardon, there is no indication at all that the primary object of China's active participation in revising and creating rules is maritime order (p. 2). The same problem is also reflected in the interpretation of China's goal of being a "maritime power" (p. 42). The interpretation of paragraph 92 of China's Position Paper, indicating China's intention to exclude UNCLOS's application to all of its maritime disputes with historically complex and politically sensitive matters, is totally distorted (p. 219). Piecing together or speculating on the meaning of materials to support the author's arguments can be misleading, particularly when the materials are political or official in nature.

Finally, Kardon's identification of "specially affected states" lacks sufficient argumentation, posing a fundamental problem. The Specially Affected States Doctrine (SASD) is a significant yet ambiguous topic in the evolution of international law. It takes efforts to identify states whose interests are specially affected by a proposed rule, as both Heller's and Yeini's work published in the *American Journal of International Law* reveals [13–15]. However, this book provides little evidence that Kardon recognized the complexity of the SASD and took it seriously. His arbitrary identification of particularly affected countries may undermine the validity of his entire study, which relies on this doctrine.

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#### Notes:

1. The term "local impact" denotes how China's actions influence rules in specific disputes with other states, whereas the term "regional impact" is assessed based on the behavior of a representative group of states towards particular rules in a region, such as East Asia as discussed in this book.

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