exactly will be prepared to provide the resources to intervene, whether those will be enough in any given matter, and, often more tellingly, whether the states involved will be prepared to shoulder the greater burden of rebuilding another state ravaged by war.

Stephen Bouwhuis

Former Assistant Secretary, Office of International Law,
Australian Government.
Currently Legal Counsel for the Commonwealth Secretariat
Email: stephen.bouwhuis@gmail.com

doi:10.1093/ejil/cht035

Michael Waibel. ***Sovereign Defaults before International Courts and Tribunals***. Cambridge: Cambridge University Press, 2011. Pp. 361. £74. ISBN 9780521196994.

Michael Waibel's book is a timely, elegant, and rich study of the adjudication of sovereign defaults by international courts and tribunals. In a time of learning the hard way to overcome what Reinhard and Rogoff's study of financial crises has described as the 'this-time-is-different' syndrome, Waibel gives us an account of the underdeveloped state of the law regulating sovereign debt through the study of the relevant cases before international courts and tribunals. These kinds of disputes abound: Waibel's book explains and assumes that '[e]ver since the birth of the modern fiscal and borrowing state in the seventeenth century, disputes on the non-payment of sovereign debt have been common' (at 8). The book, which has won the 2012 European Society of International Law Book Prize, presents a thorough study of these disputes organized in two parts: the first part is a history of the varied ways in which sovereign defaults have been adjudicated on internationally over the past 150 years; the second part concentrates on the present and future resolution of sovereign defaults by international courts and tribunals, and particularly on the role of arbitration on sovereign debt.

After a short introductory chapter in which the author gives us a taste of the nature of 'sovereign defaults as a perennial feature of sovereign lending' (at 8), together with a few preliminary views on sovereign debt and its restructurings, Waibel starts an encyclopaedic tour of the history of past sovereign defaults through adjudication. A descriptive narrative governs the first part of the book. Here, Waibel writes as a legal historian and prudently lets the facts speak for themselves in most of the cases. I can give only a partial account of the history told in this part, highlighting some of the most salient cases and doctrines considered by the author.

The history begins with political responses to sovereign defaults, including the use of force, loan sanctions, diplomatic protection, and diplomatic settlements. The *Venezuelan Preferential Case* is key to conveying a state of affairs that did not rule out military interventions over sovereign debt. However, as Waibel shows, even in the early 1900s creditor governments were conscious of their subsidiary role and discretionary support to their nationals in responding to sovereign defaults. In other words, political considerations were crucial to understanding the decisions to use force in debt crises, and the Venezuelan case was no exception (at 30). That is when the Drago Doctrine enters the scene. The Doctrine is celebrated as a major contribution of Latin American international law to the series of efforts that led to the prohibition on the use of force as a means to settle disputes. Waibel, of course, gives appropriate consideration to the Doctrine in the context of forcible actions to recover sovereign debt, but notes that 'the Doctrine has a subversive element, in that it has the potential of undermining compliance with sovereign debt obligations – a concern that was widespread among creditors at the time' (at 36).

In this sphere of political responses, Waibel also gives examples of quasi-receivership of highly indebted countries, which was 'a method of enforcement short of military intervention' (at 42).

The most interesting case to this reviewer is the Dominican Republic's receivership. Indeed, the Dominican case reveals the situation of control of that country by the US from 1905 to 1940. Leaving aside the political considerations that caused the intervention, it is worth mentioning that the well-known international lawyer John Basset Moore, simultaneously acting both as counsel of the New York-based Santo Domingo Improvement Company and on behalf of the US, argued that 'revolutions and anarchy were no excuse for the non-payment of debt', but also said that repayment could not put 'improper or undue strain on the people' (at 50).

The World Court dealt with only three cases on sovereign debt. The *Serbian Loans* and the *Brazilian Loans* cases, both submitted to the PCIJ under special agreements and decided in July 1929, were about the interpretation of the gold clauses in the loan agreements to decide whether payment was due in gold or French francs. The Court discussed issues concerning necessity, *rebus sic stantibus*, and estoppel, but ruled in favour of France, upholding the validity of the gold clauses. In the *Norwegian Loans* case, decided in July 1957 and also about whether to uphold gold clauses in sovereign bonds, the ICJ found that it lacked jurisdiction. This was an incorrect decision according to Waibel, who expresses his support for the dissent of Judge Lauterpacht, who affirmed that the case was not wholly outside the orbit of international law (at 73). Moreover, Waibel maintains that the *Norwegian Loans* case 'does not necessarily stand for the proposition that sovereign bonds governed by municipal law are outside the orbit of international law generally' (at 85). Waibel explains that one reason for the scarcity of World Court decisions on sovereign debt is that 'sovereign debt disputes are seen to be of a commercial, private law character, as opposed to the classical public international law cases typically before the court' (at 60). The present global financial crisis may have changed that perception. Be that as it may, the author is right to signal that the outcomes of those decisions are explained by big macroeconomic changes, i.e., the abandonment of the gold standard for a system of fixed exchange rates. Other cases related to monetary reform, such as the *Young Loans Arbitration*, are included in the analysis in order to suggest that 'international law provides limited protection for creditors against changes to exchange rates' (at 87).

The chapter on financial necessity included in the first part of the book considers the *Russian Indemnity* case, *Socobelge*, and the ICSID cases arising out of Argentina's default. Waibel affirms that the *Russian Indemnity* case is interesting today only for its statements on liability, which consider that sovereigns are ordinary debtors, and that no special regime of responsibility exists for sovereign pecuniary obligations or money debts (at 94). The *Socobelge* case is worthy of note for its recognition of the importance of the duty of a government to ensure its essential public services *vis-à-vis* its obligation to pay its debts (at 98). But it is the Argentinian saga of financial necessity defences that attracts all the attention today. Waibel shortly describes the evolving state of the situation, underlying controversial issues such as the 'only way' criterion, and governments' margin of appreciation, and rightly asserts that '[t]here is a need for further clarification on the status of financial necessity in international law' (at 88).

National courts are obviously part of the study too. Waibel affirms that '[o]n average, creditor recovery in national courts is low' (at 121). Even when creditors obtain judgments in their favour, state immunities of execution and the difficulties of finding attachable assets abroad prove to be insuperable obstacles to executing them. This fact, however, does not represent a definitive disincentive for holdout creditors, as the recent cases against Argentina before American courts have shown. Waibel says that this kind of obstacle explains 'why arbitration, in particular before ICSID, may be attractive to sovereign creditors' (at 128). Though compliance with ICSID arbitral awards is high, the effectiveness problem also appears in the ICSID sphere, and Waibel deals with the problem only briefly at the end of his book in relation to sovereign debt arbitration (at 318–320). He connects the effectiveness issue with the fact that ICSID is part of the World Bank, and the prospects of establishing a policy that would block World Bank or IMF funding to recalcitrant countries.

The first part continues with the analysis of arbitral proceedings that arose from cases of state succession, such as the expeditious *Ottoman Public Debt Arbitration*; odious debt cases, such as the *Tinoco* arbitration; cases dealing with the determination of the capacity to pay, like the London Debt Agreement; an examination of the lack of arbitration clauses in sovereign debt instruments, which 'almost invariably submit to the jurisdiction of national courts in important financial centres' (at 157); and cases arising out of international law remedies decided by international tribunals and mixed commissions under international law. All these pages are full of interesting facts and ideas, and the statements on creditor protection in international law are particularly relevant as they conclude with a note of scepticism on 'whether international law, which traditionally provided lower protection thresholds than the constitutional law in a well-developed municipal legal system, grants much greater protection to owners of property and individuals to whom a contractual obligation is owed' (at 206). This question opens the door to the analysis conducted in the next part of the book on the role of arbitration on sovereign debt.

Waibel changes the tone in the second part of the book. The analysis continues to be impeccable, but the language becomes predominantly normative, with a series of theses as clear and well-founded as they are controversial. His analysis in this part begins with a consideration of the jurisdictional prerequisites of ICSID arbitration on sovereign debt. Chapter 10 presents a strong argument against 'the conventional wisdom' that ICSID jurisdiction over debt instruments in general and sovereign bonds in particular is straightforward (at 250). On the contrary, Waibel believes that sovereign debt does not qualify as an investment under Article 25 of the ICSID Convention. Waibel defends the need for a double review of ICSID subject-matter jurisdiction: the investment requirement in Article 25 must be fulfilled independently of consent in the BIT – a different interpretation would make Article 25's investment requirement an 'empty shell' (at 244). For the author, the analysis of ICSID case law 'supports the conclusion that modern sovereign bonds are ordinary commercial transactions' (at 250).

After that Waibel considers issues connected to overlapping jurisdiction over sovereign debt. The fact that sovereign bonds are usually governed by the national law of important financial centres, and subjected to the jurisdiction of its courts, may lead to jurisdictional conflicts and parallel proceedings between those national courts and ICSID tribunals. Waibel is concerned with the preservation of the unity of the contractual bargain. He maintains that a BIT consent and a jurisdictional clause in the contract are on an equal footing. Therefore, in order to maintain the unity of the contract, his position would bar ICSID arbitration when exclusive domestic jurisdiction is provided for in sovereign debt instruments which would extend also to treaty causes of action. This conclusion, of course, does not affect ICSID jurisdiction over treaty and contract claims *vis-à-vis* non-exclusive jurisdiction clauses.

The discussion on whether sovereign defaults trigger the international responsibility of the defaulting country is carried out in Chapter 12 through the examination of four standards: most-favoured nation, national treatment, expropriation, and fair and equitable treatment. The chapter is particularly interesting because so many issues in this area are either unresolved or in flux, including procedural issues such as how ICSID will deal with numerous bondholder claims in a single arbitration, and substantive issues such as whether sovereign debt is subject to expropriation, and the legal character of a non-payment of sovereign debt in international law. I share Waibel's cautious approach that '[u]nless [a] restructuring manifestly discriminates against a non-participating minority, ICSID tribunals ought to leave considerable leeway to countries in designing their sovereign debt restructurings' (at 297). In any case, as explained in Chapter 13, due to the characteristics of traded sovereign debt, partial compensation must be considered the general rule to determine the creditor's recoverable losses.

In conclusion, Waibel argues that national courts are the proper forum for the settlement of disputes arising out of sovereign debt. The author believes that ICSID tribunals lack jurisdiction and are unable to deal effectively with sovereign debt crises. Could this change in

the future? Waibel's answer is a qualified yes: '[t]he preconditions for effective arbitration in the future include dedicated and durable institutions, the progressive development of the international law on public debt, and protection for the country's essential public services in financial distress' (at 323). Although there is space for disagreement, it cannot be put more clearly.

As happens with great books, there are many ways to gain from reading the one under review. As I went over the chapters, I imagined international legal scholars thinking about the ways in which this book could be the basis for either a course on international dispute settlement, or a seminar on international investment arbitration, or a post-graduate class on state responsibility or state succession on public debt. I have also thought about practitioners writing in the margins of the book about their future legal strategies in proceedings involving sovereign defaults, or judges and arbitrators looking for the best available argument to solve a difficult case involving international law on public debt. In a world in which the law of sovereign debt is in need of serious development, *Sovereign Defaults before International Courts and Tribunals* is a fine and enduring piece of scholarship, which will be crucial in framing the discussion of the adjudication of sovereign defaults for years to come.

Carlos Espósito

University Autonoma of Madrid
Email: carlos.esposito@uam.es

doi:10.1093/ejil/cht039

Bas Schotel. ***On the Right of Exclusion: Law, Ethics and Immigration Policy***. Oxford and New York: Routledge, 2012. Pp. 218. £42.99. ISBN: 9780415575379.

A commonplace assumption of migration law is the concept, sometimes called a rule, of inherent sovereign power. Accordingly, a state is said to possess an unbridled power to exclude any or all foreigners from admission into its territory. This assumption is trumpeted as a hallmark of the nation-state system and a foundation of national communities. It is, however, highly questionable, and arguably discredited by general practice and the writings of qualified publicists since the 17th century. In fact, states normally admit limited numbers of foreigners, not only out of self-interest but also for reasons of international cooperation, solidarity, and other motivations premised in *opinio juris*. Still, the inherent sovereignty rule labours on against the evidence, not so much among policymakers and busy administrators, who ordinarily know better, but among academic writers, who should know better. Unfortunately, the concept is not just academic. Instead, it shapes public understanding and discourse about human migration and contributes to unnecessarily restrictive paradigms within which national and international regulation of migration is moulded.

In the book under review, Bas Schotel of the University of Amsterdam casts a critical eye on the so-called right of exclusion, and debunks the underlying concept of inherent sovereign power as a basis for excluding 'normal migrants'. He defines these persons as those who, unlike refugees and members of a permanent resident's family, do not have what he calls a legal right to admission. Instead of having an inherent sovereign power to exclude aliens, Schotel argues to the contrary that states must justify the exclusion of normal migrants. What is more, to discharge that burden, they must provide sound, substantial, and specific reasons for exclusion. Without such justification applicants for admission to the territory of a state are unable to challenge refusals of admission in courts of law. Consequently, they are unfairly denied access not only to territory, but also to welfare opportunities, labor markets, security, social and political life, and a new legal order in which to conduct their lives. Thus, exclusion without justification,