Editorial

We invited Thomas Streinz, Fellow at the Institute for International Law and Justice, NYU School of Law, to contribute a Guest Editorial to our Journal. Taking Joseph Weiler’s recent Editorial, “The Case for a Kinder, Gentler Brexit”, as its starting point, Mr Streinz argues that the principle of “sincere cooperation” requires the Union and a departing member state to pursue a “cooperative” approach to withdrawal, and applies that proposition to the contested area of trade policy in the context of the United Kingdom’s impending withdrawal from the Union.

Cooperative Brexit: Giving back control over trade policy*

1. Introduction

Joseph H. H. Weiler has made the case for a kinder, gentler, Brexit.1 In this contribution, I argue that a constructive and mutually respectful approach towards the negotiations between the EU and a withdrawing member state is not only politically and economically desirable but legally required by the principle of sincere cooperation, which is enshrined in the EU Treaties2 and part of the constitutional fabric of the EU legal order. The determination of the terms for withdrawal and the nature of the future relationship between the EU and a member state which is choosing to leave the EU is fundamentally different from the conduct of negotiations between the EU and third countries, because all parties operate within the EU legal framework during the withdrawal process. The principle of sincere cooperation is an integral part of this “supranational law of Brexit” and it provides the legal foundation for what I will call “cooperative Brexit.” Far from mandating any concrete outcomes, “cooperative Brexit” reframes the process of de-supranationalization and re-nationalization, on which the UK is embarking, and affirms the insight that the right to leave the EU contributes to its enduring legitimacy.3

* The author is indebted to Lorand Bartels, Gráinne de Búrca, Sara Dietz, Elaine Fahey, Daniel Francis, Daniel Fröhlich, Holger Hestermeyer, David Kleimann, Paul Mertenskötter, Timothy Roes, and Johann Justus Vasel for invaluable comments, corrections, and suggestions. He also thanks the participants of the Conference on the Future of European Constitutionalism at Boston College and Boston University on November 17–18, 2016, organized by Vlad Perju and Daniela Caruso, and the Brexit reading group at NYU School of Law, led by Christine Landfried and Peter Lindseth, for stimulating discussions. The usual disclaimer applies.

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2 Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), O.J. C 202/1, June 7, 2016.

As I will show in this article, the continued application of EU law during the withdrawal process has further consequences: it requires the leaving member state to adhere to the division of competences established by the Treaties until it has formally left the EU. This presents a challenge for the timely realization of the UK government’s vision of a “global Britain” in pursuit of new trade deals with countries across the globe, because the EU retains exclusive competence over the “common commercial policy” (CCP), which is “trade policy” in all but name. Curiously, in this context it is precisely the principle of sincere cooperation that blocks the UK from unilateral action. “Taking back control” will take time. Realists are right to point out that enforcement of these boundaries is only a theoretical possibility which has hardly any deterrent effect—and Foreign Secretary Boris Johnson seemed indeed ready to tread the line by suggesting that a deal with India could be sketched out in pencil “on the back of an envelope”—but they underestimate the UK’s self-interest in adhering to the rules and the constraining power of law in the absence of judicial enforcement.

There is, however, a rarely discussed option in line with the spirit of a cooperative Brexit that would allow the UK to negotiate its own trade deals prior to leaving the EU without violating EU law: the EU could re-empower the UK to conduct its own trade policy in lieu of continued participation in the CCP. “Giving back control” to a single member state would be unprecedented but arguably justifiable in the exceptional case of a withdrawing member state. The UK could be granted the highly symbolic and practically important right to formally start its own trade negotiations. In return, it could make no less symbolic or important concessions regarding its conduct during its remaining time as an EU member state to prevent repercussions of the Brexit negotiations for the EU’s own trade and wider legislative agenda, in which the UK will continue to have a say until it has formally left the EU.

I have no doubt that a cooperative Brexit would require political will that may well be lacking. But to suggest that this is “the end of law and the return of politics” is a blatant overstatement. This article aims to show how EU law has framed the Brexit debate and will continue to do so. Section 2 will start by outlining the “supranational law of Brexit” by which I mean all EU law that is pertinent to the withdrawal process. While the now-famous article 50 of the Treaty on European Union (TEU) sets up a rudimentary structure for the withdrawal process, general principles of EU law fill the gaps. One of them is the principle of sincere cooperation whose implications (and inherent limitations) for the Brexit negotiations I will explore in Section 3 to outline

6 See Marise Cremona, Negotiating Trade Deals Before Brexit?, SOCIAL EUROPE (July 25, 2016), available at https://perma.cc/G9C2-NTSM: “... it might even be conceivable that the Council would authorize the UK to start actual negotiations on revised trade relations before formal withdrawal.”
7 Hosuk Lee-Makayima, quoted in Joanna Sopinska, Brexit: Experts Shed Light on What UK Can and Cannot Do Next, EU TRADE INSIGHTS (July 29, 2016, 10:25 a.m.), available at https://perma.cc/3ZT2-TJKZ.
what “cooperative Brexit” entails. The ensuing section applies this concept to the contentious area of trade policy and discusses the possibility of “giving back control,” i.e. re-empowering the UK to conduct its own trade policy. Section 5 concludes by contrasting “cooperative Brexit” with “confrontational Brexit” which is likely to lead to economic disaster, but also inadvertently increases the remote chance of “Bremain,” i.e. no Brexit at all, with the UK ultimately staying within the EU.

2. The supranational law of Brexit: Article 50 TEU and beyond

Before the introduction of article 50 TEU by the Treaty of Lisbon, it was disputed whether a member state could resort to general principles of international law to unilaterally withdraw from the EU.8 Since this question has become moot, there is a tendency to overlook two other forms of withdrawal: mutually agreed withdrawal and unlawful withdrawal. Both hold valuable lessons for the supranational law of Brexit as it stands now.

Mutually agreed withdrawal has always been possible, because as Herren der Verträge,9 EU member states can change the EU Treaties at will.10 This includes the consensual decision that one of them should be allowed to leave the club. This is likely the method that member states would have used if the first Brexit referendum in 1975 had yielded a different outcome.11 Indeed, Greenland and Algeria left the European Economic Community (EEC) by agreement of all member states, including Denmark and France, with which they had joined in 1973 and 1957 respectively.12 While certainly not comparable in many respects, the fact that it took three years from the

8 See Allan F. Tatham, “Don’t Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon, in EU LAW AFTER LISBON 128, 142 (Andrea Biondi ed., 2012) (with further references).
9 “Masters of the Treaties”: the phrase is routinely used by the German Constitutional Court to emphasize member states’ sovereignty. See, e.g., Bundesverfassungsgericht, 2 BvE 2/08 (Lisbon), BVerfGE 123, 267, para. 231.
10 But see Reijer Passchier & Maarten Stremler, Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision, 5 CAMBRIDGE J. INT’L & COMP. L. 337 (enquiring whether the concept of ‘unconstitutional constitutional amendments’ can be applied to the EU Treaties); for this concept see the foundational work by Yaniv Roznai, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: A STUDY OF THE NATURE AND LIMITS OF CONSTITUTIONAL AMENDMENT POWERS (2017); see also Di Fabio, Some Remarks on the Allocation of Competences Between the European Union and Its Member States, 39 COMMON Mkt L. REV. 1289, 1291 (2002) (alluding to equivalence between law in European Treaties that is contrary to the Treaties with the legal concept of “unconstitutional constitutional law”). See also Jochen Herbst, Observations on the Right to Withdraw from the European Union: Who Are the “Masters of the Treaties”? 84 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN REcht UND VÖlkERRECHT 384, 387 (2006) (questioning the introduction of a withdrawal right into the Community legal order).
11 Back then a solid two-thirds majority (with a 65% turnout) chose to remain in the European Economic Community (EEC). For similarities and differences between the two Brexit referenda, see Andrew Glencross, Looking Back to Look Forward: 40 Years of Referendum Debate in Britain, 6 POLITICAL INSIGHT 1 (2015).
Greenlandic exit referendum in 1982 till the Greenland Treaty entered into force (with at the time only ten EEC member states), should give anyone pause who believes the Brexit negotiations will be a swift affair. In the Algerian case, both sides agreed on the provisional continued application of the relevant Treaty articles for a period of fourteen years—from Algerian independence in 1962 until a comprehensive bilateral agreement was finally concluded in 1976. The parties cooperated to avoid an unregulated exit into a legal vacuum.

Today, article 50 TEU still favors mutually agreed exit over unilateral withdrawal, even though the introduction of a unilateral right to withdraw is its core innovation. It requires the EU and the withdrawing member state to negotiate and conclude a withdrawal agreement. Should they fail to do so within a two-year timeframe, there is still the possibility of a pragmatic solution to extend the application of EU law—by mutual agreement. In fact, if they all agreed—certainly no small “if,” but a genuine possibility—EU member states could rewrite the whole withdrawal process.

Against this backdrop, unlawful unilateral withdrawal is a useful hypothetical for the path not taken. Consider an alternative reality in which the British Parliament were to repeal the European Communities Act of 1972, the legal basis for the UK’s membership in the EU, with immediate effect. As the British government itself conceded in its Brexit White Paper, the British Parliament has remained sovereign throughout the UK’s membership in the EU, and could theoretically take such a step. It would violate its obligations under EU law, of course, but it is unlikely that the European Commission would launch infringement proceedings and even if it did, a UK gone rogue would likely defy the Court of Justice of the European Union (CJEU) anyway. While history is full of military conflicts over secessions, use of force to preclude unlawful withdrawal from the EU is outright unimaginable, not because the EU itself lacks the capabilities, but because it would be pointless: EU membership is voluntary, as article 50 TEU makes clear.

It may be true that article 50 TEU was designed to never be used. But it was certainly meant to reassure member states in a legally significant (and highly symbolic)
way that their participation in a process of creating an “ever closer union” was not irreversible. Some have questioned the wisdom of introducing article 50 TEU. However, Daniel Francis has convincingly shown that exit rights contribute to the legitimacy of legal orders and are hence normatively desirable. I would add that by making unlawful withdrawal utterly unnecessary, article 50 TEU has strengthened the EU as a legal order. The fact that all sides in the Brexit debate—the withdrawing member state, the EU institutions, and the remaining member states—are committed to the article 50 TEU process is testament to this. All parties implicitly acknowledge that the withdrawal process is to be conducted subject to EU law, within the frame established by article 50 TEU.

Article 50 TEU itself only provides a rudimentary structure for the exit process. Its affirmation of the right to withdraw comes with no EU law strings attached: the decision is for the member state to take according to its own constitutional requirements. In the case of the UK, the seminal judgment of the UK Supreme Court in Miller clarified these in favor of parliamentary sovereignty instead of royal prerogative. Accordingly, an Act of Parliament, the European Union (Notification of Withdrawal) Bill empowered the British Prime Minister to notify to the European Council the UK’s intention to withdraw from the EU. This notification triggers a two-year period during which the EU and the leaving member state shall negotiate and conclude a withdrawal agreement.

There is a tendency to understand this timeframe as a mechanism to stack the deck against the leaving member state because extension requires a unanimous decision by the European Council (which is widely perceived as unlikely, though certainly not impossible, depending on the political situation and circumstances). This interpretation presupposes that not reaching an agreement (and not extending the deadline)

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21 TEU, supra note 2, Preamble, Recital 13; art. 1(2).
22 Jan Klabbers, Continent in Crisis, Guest Editorial, 27 Eur. J. Int’l L. 553, 555 (2016): “including a withdrawal clause in a treaty such as the TEU is asking for trouble” (also referencing the historic example of the League of Nations); Carlos Costa, Interpreting Article 50: Exit and Voice and . . . What About Loyalty?, EUI Working Papers RSCAS 2016/71, available at http://cadmus.eui.eu/handle/1814/44487 (lamenting that the article 50 TEU undermines loyalty and diminishes the contribution of voice, i.e., the political process: referencing Cass Sunstein’s well-known critique of secession rights and Hirschman’s seminal work on exit, voice and loyalty).
23 Francis, supra note 3, at 37.
24 TEU, supra note 2, art. 50(1).
26 Id. art. 50(2).
27 Id. art. 50(3).
is worse for the leaving member state. This may be true, but it would undoubtedly be bad for both sides. Reaching a withdrawal agreement is clearly the superior outcome.

Against this backdrop, the two-year period should not just be understood as a window for negotiation, but also as an opportunity for reconsideration. If the withdrawing member state wants to reverse course while still being a member of the EU, it may simply withdraw the notification of its intention to withdraw to halt the withdrawal process. It is true that article 50 TEU is silent on this question. This leads some to think that the possibility is implicitly ruled out (if it is not mentioned, it is not there) while others take exactly the opposite view (if it is not explicitly ruled out, it does exist).

Rather than succumbing to the fallacies of the argumentum e contrario, Paul Craig has argued convincingly on the basis of general principles that ‘exit from exit’ is possible. The fact that both sides in Miller took the opposite view—the applicants for tactical reasons, the government for political ones—is irrelevant, because this is a question for EU law, and ultimately the CJEU to decide. In any case, if there was unanimous agreement between all EU member states, including the withdrawing member state, all options are on the table—including treaty change to clarify this issue.

Crucially, during the two-year period (and possibly longer, if extended) EU law continues to apply to the withdrawing member state. This has two distinct consequences which are widely overlooked.

First, the UK retains all rights and obligations as an EU member state until the very moment in which it ceases to be one. The resignation of the British member of the European Commission in the wake of the Brexit referendum was a political reaction not a legal requirement. Indeed, a new Commissioner from the United Kingdom has assumed office. In the same vein, the UK continues to participate in the activities of the Council and the European Council. The only exceptions are discussions of these two bodies that concern the Brexit negotiations with the UK.

Second, EU law continues to apply to the withdrawal process for its duration. As Piet Eeckhout and Eleni Frantziou have put it: “Even if constituting the most

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29 See Miller [2017] UKSC 5, para. 36: “when Notice is given, the [UK] will have embarked on an irreversible course’ and para. 37: “submissions on behalf of the Secretary of State, did not challenge much if any of the factual basis of these assertions.”
30 At the time of writing, a case is pending before the Irish High Court that seeks to refer this question to the CJEU: Maugham & Ors v. Ireland & Anor, 2017/781 P.
31 TEU, supra note 2, art. 50(3).
33 TEU, supra note 2, art. 50(4)(1). This also means that the British Members of the European Parliament (EP) will have the right to participate and to vote on the withdrawal agreement, for which the consent of the EP is required: see id. art. 50(2) TEU. This is in line with the supranational nature of the EP in which citizens of Europe are directly represented: see id. arts. 10(2)(1) and 14(2).
fundamental form of rejection of EU law, the process of withdrawal must take place in accordance with the relevant EU law provisions, rules and principles.” 34 While they focus mainly on “constitutional values” and “substantive constitutional requirements” that will continue to apply to the EU after the withdrawal process (with a credible possibility that arrangements will be challenged in Luxembourg), I want to shed light on a general principle of EU law that applies during the withdrawal process to all sides and that has been largely overlooked so far: 35 the principle of sincere cooperation.

3. Negotiating Brexit in a spirit of sincere cooperation

What is now known as the “principle of sincere cooperation” and enshrined in article 4(3) TEU, has been recognized as a general principle of EU law for decades. 36 The terminology in case law and scholarship over the years has varied and its legal bases in the Treaties have shifted. 37 Whether it resembles “good faith” as understood in international law and/or in federal constitutional systems has been subject to debate, as this issue raises controversial questions regarding the very nature of the EU. 38 But whatever its name, legal basis, and nature, there can be no doubt that it is a foundational general principle of the EU legal order, that some even consider to be the most important one. 39

I argue that the principle of sincere cooperation continues to apply in the negotiations between the leaving member state, the EU, and its remaining member states. The duty created by this legal principle is admittedly vague and difficult to enforce but may still provide valuable guidance in this situation of crisis, contestation, and uncertainty by guarding against counterproductive obstructionism on both sides, and by framing Brexit as an issue that can and must be dealt with in concert. I call this approach “cooperative Brexit.”

Employing the principle of sincere cooperation in the context of a withdrawing member state may seem counterintuitive. It is true that much of the relevant case law is concerned with instances in which EU institutions demand sincere cooperation from some reluctant member state to advance European integration. 40 But the principle of sincere cooperation cuts both ways and has a more general application. It creates obligations not just for the member states vis-à-vis the Union but also vice versa.

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35 An exception is Takis Tridimas, Article 50: An Endgame Without An End, 27 KINg’S L.J. 297, 306 (2016) (arguing that both parties have an obligation to conduct [Brexit] negotiations in good faith and in a spirit of cooperation). See also, id. n.32 (arguing for the continued relevance of art. 4(3) TEU after notification).
38 Id.
39 John Temple Lang, Article 10—The Most Important “General Principle” of Community Law, in General Principles of EC Law in a Process of Development 76 (Ulf Bernitz et al. eds., 2008).
40 See, e.g., Case C-246/07, Commission v. Sweden, ECLI:EU:C:2010:203.
versa, as well as between member states and between EU institutions. In the words of article 4(3) TEU, it requires the EU and its member states to assist each other in full mutual respect when carrying out tasks which flow from the Treaties. The Brexit negotiations are such a task. The EU is required to negotiate and conclude an agreement with the withdrawing member state. This, of course, does not require the EU to accept anything the leaving member state demands nor can the EU ignore the limitations that are set by EU law. The only other instance in which the EU is required to negotiate and conclude an international agreement—the accession to the European Convention on Human Rights (ECHR)—may serve as a reminder that these hurdles may indeed prevent the EU from fulfilling its task—but a task it remains and hence the principle of sincere cooperation applies.

In this context, it is important to overcome the flawed argument that an uncooperative stance vis-à-vis withdrawing member states was required pour encourager les autres. If it were true that negotiating in sincere cooperation with the withdrawing member state would lead to the unraveling of the Union, as other member states would swiftly follow the lead of the withdrawing member state, there would indeed be no obligation to negotiate in a spirit of sincere cooperation as the Union is not required to contribute to its own self-destruction. But it is not true. The instinct to punish the UK for its decision to leave the EU needs to be overcome. It would not convince anyone of the EU’s superior approach and inherent merits. Instead, it would embolden the EU-skeptical factions in the UK and elsewhere who would blame the EU and its uncooperative stance for the UK’s malaise.

The UK will suffer from Brexit, not least because it will lose its voice within the world’s most powerful trading bloc. In all likelihood, it will have to renegotiate all preferential trade agreements to which it currently belongs because of its EU membership status. In these negotiations, the UK will be at a comparative disadvantage because

41 See De Buere & Roes, supra note 37, at 836.
42 TEU, supra note 2, art. 4(3).
43 Id. art. 50(2).
44 Id. art. 6(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, in force Nov. 3, 1953, 213 U.N.T.S. 222.
45 The ECJ declared the draft accession agreement to be incompatible with the EU Treaties; Opinion 2/13 concerning the accession of the EU to the ECHR, ECLI:EU:C:2014:2454.
46 For a similar line of reasoning against this argument, see Weller, supra note 1.
47 This is clear for all (not just trade) agreements to which only the EU is a member (which are binding upon EU member states only by virtue of TFEU, supra note 2, art. 216(2)) unless one thinks that the UK might succeed—under customary international law on the succession of states to treaties—to those in which the EU has exclusive competence; see Lorand Bartels, The UK’s status in the WTO after Brexit (Sept. 23, 2016), available at https://ssrn.com/abstract=2841747 (arguing that the UK will succeed to the WTO Governmental Procurement Agreement).

In the case of so called mixed agreements, the UK is a party in its own right under international law. But Brexit arguably constitutes a fundamental change in circumstances which would allow the third party state to terminate the agreement according to VCLT, supra note 28, art. 62 (clausula rebus sic stantibus). Even if a third party state were to decide to leave the agreement in place (to avoid economic disruption), the agreement’s substantive provisions would arguably not apply to the UK. Recent EU–FTAs define their territorial applications as constrained to the territories in which the EU Treaties are applied (cf. Free trade Agreement between the European Union and its Member States, of the one part, and the Republic
of its smaller market power\textsuperscript{48} and its need to build new trade relations as quickly as possible. Its best alternative to (re)negotiated agreements is trading according to World Trade Organization (WTO) rules.\textsuperscript{49}

Hence, there is no reason and no need to add insult to self-inflicted injury. To the contrary, negotiating in sincere cooperation will expose the UK government’s flawed reasoning in a much more effective manner because its ability to blame the EU will be significantly curtailed.

What then can we infer from the principle of sincere cooperation for the Brexit negotiations? As a general principle of EU law, it fills various gaps in the withdrawal process as constructed by article 50 TEU. At the same time, it provides a narrative for the Brexit negotiations which enhances the chance of reaching a withdrawal agreement that is in the mutual interest of all sides. However, all this is not to suggest that sincere cooperation is a panacea. Its inherent limitations will become clear very quickly. My argument is that despite these limitations, the principle of sincere cooperation can usefully be employed in the Brexit negotiations as legal foundation for “cooperative Brexit.”

The first gap in the withdrawal process that can be addressed by recourse to the principle of sincere cooperation concerns the timing of the withdrawal notification. Article 50 TEU requires the leaving member state to notify the European Council of its decision to withdraw, but does not state a time frame for notification. In the case of Brexit, former Prime Minister David Cameron did not deliver on his promise to “trigger” article 50 TEU on the day after the referendum. In hindsight, this was the right decision, not only because it mitigated the fallout from an unexpected referendum result, but also because the UK Supreme Court later clarified that an Act of Parliament was required to formally take the decision that would then be notified to the European Council.\textsuperscript{50} As we have seen, article 50 TEU recognizes that the withdrawal decision must be taken according to the withdrawing state’s constitutional requirements. However, the principle of sincere cooperation demands—in this context—that the EU institutions are being consulted throughout and that notification is not unduly delayed. After some initial irritation, the UK has been in compliance with these demands.

A second example in which the principle of sincere cooperation aids in legal gap-filling in the context of article 50 TEU concerns the question whether “exit from exit”—i.e., reversal of the decision to withdraw and revocation of the initial

\textsuperscript{48} On the correlation between market power and the term of free-trade agreement, see Sophie Soete & Jan Van Hove, Free Trade Agreements and Market Power, FREIT Working Paper 1147 (Nov. 18, 2016), available at https://perma.cc/UFK9-W995 (with further references).

\textsuperscript{49} For a classic text on the relevance of the BATNA, see Roger Fisher, William Ury & Bruce Patton, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1992).

\textsuperscript{50} Miller [2017] UKSC 5.
notification—is possible.\footnote{See supra text accompanying notes 28–30.} If it were not for the principle of sincere cooperation, there would indeed be a risk that a withdrawing member state could halt and restart the withdrawal process at will by withdrawing and resubmitting notifications of withdrawal. This would circumvent the two-year timeframe and would defeat its purpose of providing legal certainty after a limited period of time (unless everyone agrees on an extension). Hence, the principle of sincere cooperation restricts the “exit from exit” option to decisions that are taken in good faith. “Gaming the clock” is not an option.\footnote{See also Eeckhout & Frantziou, supra note 34, at 3: “It would . . . be politically and constitutionally incongruous for the EU not to accept a \textit{bona fide} revocation of notification within the two-year timeframe if it occurred. Provided that any new decision not to withdraw is taken in good faith, therefore, the Article 50 [TEU] clock could technically be stopped.”}

The third and arguably most important way in which the principle of sincere cooperation may play a role is in mitigating the effects of the continued membership of the withdrawing member state in the EU’s day-to-day operation. As we have seen, the withdrawing member state retains all rights and obligations under EU law until it formally left the EU. If the relations between the EU and the withdrawing member state deteriorate during the withdrawal process or if the withdrawal negotiations hit an impasse, the withdrawing member state may feel tempted to abuse its membership position to coerce concessions from the EU and the remaining member states. Especially in areas in which unanimity is still required, such as in the Common Foreign and Security Policy,\footnote{TEU, supra note 2, art. 24(1)(2).} the withdrawing member state could prevent the EU from taking any action. The same logic applies in the case of mixed agreements which require the signature (and ratification) by the EU and \textit{all} EU member states. Such blatant obstructionism would arguably violate the principle of sincere cooperation. Yet, it also highlights its inherent limitations. Its implications are vague: what kind of cooperation is required, what kind of obstructionism is unlawful? And in any case, its justiciability is doubtful in the context of exit negotiations: even if the European Commission or EU member states would initiate infringement proceedings, they would likely be pointless. If we were to arrive at a point at which the parties were to resort to the CJEU to adjudicate their disputes over the proper conduct of the Brexit negotiations, cooperative Brexit would have failed.

Negotiating Brexit in a spirit of sincere cooperation tries to contain the drivers of deteriorating relations from the start by breaking out of the confrontational \textit{do-ut-des} logic and by replacing it with a cooperative approach in which (a) the EU recognizes the UK’s right to leave, (b) the UK does not interfere with EU policy to which it will no longer be subject, and (c) both sides make a best faith effort at reaching a withdrawal agreement, as well as agreement on their future relationship. Even though the principle of sincere cooperation does not provide much substantive guidance, its driving narrative may help to animate proposals for reciprocal and mutually beneficial solutions on contentious questions such as the future status of UK nationals in the EU and of EU citizens in the UK. The notion of cooperative Brexit seeks to convey a fundamental insight: the negotiations between the EU and a withdrawing member state are
entirely different in character from negotiations between the EU and third countries. Brexit is a *common* project in which the EU, the UK, and the remaining member states are engaged. To take on this task in a spirit of sincere cooperation and mutual respect is likely to yield the best possible outcome for all sides. The Treaties require nothing less.

4. Sincere cooperation in trade policy

The “cooperative Brexit” approach can and should be employed in every policy area affected. In this section, I will explore “cooperative Brexit” in the highly contested area of trade policy. Disentangling the UK from the EU’s common commercial policy is a complex affair that requires sincere cooperation to optimize the sequencing and to minimize the fallout.

4.1. The EU’s exclusive competence over trade policy

The decision to transfer trade policy to a supranational entity dates back to the 1957 Treaty of Rome that created the European Economic Community.\(^{54}\) Once the transitional period had ended and the customs union was established, the EEC began to conduct the CCP and gradually assumed the tasks and obligations of its member states under the General Agreement on Tariffs and Trade (GATT) without ever formally joining this agreement.\(^{55}\)

In its first ever Opinion on the external relations of the EEC, the European Court of Justice (ECJ) interpreted the CCP as an exclusive competence of the Community and rendered unilateral actions by member states within this domain illegal.\(^{56}\) The Court’s reasoning still rings true. It recognized that if member states were to adopt positions which differed from the Community, this would “distort the institutional framework, call into question the mutual trust within the Community, and prevent the latter from fulfilling its task in the defense of the common interest.”\(^{57}\) Trade policy became a rare area of foreign policy in which the Community managed to speak with one voice, thereby leveraging the clout of the whole bloc. Since the Treaty of Lisbon, the exclusive character of the CCP has been explicitly recognized in the EU Treaties.\(^{58}\)

When the ECJ found that the EC lacked the exclusive competence to become a member of the General Agreement on Trade in Services (GATS) and the Agreement on

\(^{54}\) Cf. Treaty establishing the European Economic Community, art. 113, Mar. 25, 1957. Note the features of the initial setup that allowed the Community to conduct an effective trade policy: negotiations by the Commission under the guidance of the Council which operated under qualified majority voting. Contrast today’s art. 207 TFEU whose byzantine set of rules is the result of a protracted series of Treaty revisions which gave rise to repeated ECJ litigation.


\(^{56}\) Opinion 1/75 concerning the OECD Understanding on a Local Cost Standard, ECLI:EU:C:1975:145.

\(^{57}\) Id.

\(^{58}\) TFEU, *supra* note 2, art. 3(1)(e).
Trade Related Aspects of Intellectual Property Rights (TRIPS), it forced the EC into a “parallel membership” with its member states in the WTO. The ensuing series of treaty revisions of Amsterdam, Nice, and finally Lisbon expanded the scope of the CCP to include trade in services, commercial aspects of intellectual property, and foreign direct investment, but whether contemporary comprehensive trade agreements are fully covered by exclusive EU competences remains unclear and is being litigated before the ECJ. The struggle over the scope of the CCP is partly a function of its exclusive nature, which makes the delineation between EU powers and remaining competences of member states all the more salient. It also points to the uneasiness of member states which agreed to the gradual expansion of the CCP in recognition of the inherent advantages of negotiating en bloc, yet remain eager to retain veto power by insisting on mixed agreements in which the EU and its member states pool their respective competences (under EU law) and become parties to the agreement in their own right (under international law).

If an issue is covered by an exclusive EU competence, explicit language in the Treaties only bars member states from legislation and adoption of legally binding acts. However, EU case law based on the principle of sincere cooperation imposes a “duty to remain silent” on member states if speaking up would jeopardize the Union’s (emerging) common position, even in areas of shared competences. Member states


61 Cf. TFEU, supra note 2, art. 207(1).

62 Opinion 2/15 on the EU–Singapore FTA, ECCLI:EU:C:2017:376, clarified that the EU lacked exclusive competence for non-direct investment, investor-state dispute settlement, and related provisions. Contrast Advocate General Sharpston’s Opinion, ECCLI:EU:C:2016:992, who found that competences with regard to certain transport services (including links to government procurement), non-commercial aspects of intellectual property rights, and fundamental labor and environmental standards were also shared. See also David Kleimann & Gesa Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15, EUI Working Papers RSCAS 2016/58, available at http://cadmus.eui.eu/handle/1814/43948.

63 Whether the recent CETA saga, in which the regional parliament of Wallonia blocked the signing of the agreement for a week, will lead member states to reconsider this approach remains to be seen. Meanwhile, academics discuss how EU trade policy should be reformed. Contrast the Namur Declaration, Dec. 5, 2016, available at http://declarationdenamur.eu/en/ (emphasizing the need for mixed agreements to ensure the involvement of European, national, and even regional assemblies) and the Trading Together Declaration, Jan. 25, 2017, available at http://www.trading-together-declaration.org/ (claiming that current procedures, when properly implemented, will ensure democratic legitimacy of the EU’s international agreements).

64 TFEU, supra note 2, art. 2(1).

continue to engage in “economic diplomacy” and the line may be blurry at times but formal trade negotiations are clearly off limits as these would inevitably undermine the EU’s common position.

4.2. Taking back control takes time

The continued application of EU law during the withdrawal process poses challenges for the withdrawing member state. It will seek to recalibrate its economic policies but even domestic economic measures may get caught in the crosshairs of EU law.\(^{66}\) Crucially, it cannot embark on a global agenda of trade negotiations immediately. Even if the UK were to resolve the practical problem of lacking experienced trade negotiators by building trade negotiation capacity in the newly created Department for International Trade, they would be constrained by the EU’s exclusive competence over trade policy and the corresponding “duty to remain at the sidelines.” Some have questioned that such a duty exists in the case of a withdrawing member state.\(^{67}\) I will consider four possible objections, none of which appear compelling. In doing so, I will draw on selected statements by political actors that illustrate my general point that EU law has shaped the Brexit debate.

A first objection claims that the UK has decided to withdraw from the CCP and is hence no longer bound by its strictures. This view ignores the fundamental distinction in article 50 TEU between the decision to withdraw from the Union—there is no option to withdraw just from certain policy areas—and the effective date of exit, which is clearly defined as the date of entry into force of the withdrawal agreement or the expiration of the two-year timeframe (unless extended). After initial suggestions that trade negotiations would be started immediately, it is now the official position of the UK government to “support the EU’s trade agenda while we remain a member. After we leave we will look to increase significantly UK trade . . . .”\(^{68}\)

A second objection points to the phrasing in article 50 TEU according to which the withdrawal agreement shall be negotiated with the leaving member state “taking account of the framework for its future relationship with the Union.”\(^{69}\) This framework is likely to include trade arrangements, but how can one take account of them, if the UK is not allowed to negotiate trade deals? It is certainly possible to view this as an *implicit* empowerment of the UK to negotiate a trade agreement with the EU. This would *not* jeopardize the CCP because these negotiations would be conducted within the EU as long as the withdrawing member state has not left the Union. I fail to see, however, how this section of article 50 TEU can be interpreted as empowering the UK to negotiate trade deals with third countries.\(^{70}\)

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\(^{67}\) See the discussions on Simon Lester’s blog: *When Can the UK Negotiate Its Own Trade Agreements?*, INTERNATIONAL ECONOMIC LAW AND POLICY, Part I (June 27, 2016, 6:34 a.m.), https://perma.cc/QD2L-W4T8 and Part II (July 17, 2016, 8:51 a.m.), https://perma.cc/4NTR-68EK.

\(^{68}\) Brexit White Paper, supra note 4, at 52 (emphasis added).

\(^{69}\) TEU, supra note 2, art. 50(2).

\(^{70}\) For this, I suggest, re-empowerment is the only option, see infra Section 4.3.
A third objection asserts that trade negotiations by the UK would not undermine the CCP. Given that trade negotiations tend to be time-consuming affairs, one could at least start, at least with non-committal “trade talks.” Again, according to EU law, the defining line is whether such activities would undermine the EU’s CCP and “jeopardise the attainment of the Union’s objectives.” The UK may certainly prepare for its own trade negotiations by hiring and training its own trade negotiators as this would not affect the EU’s trade policy vis-à-vis its trading partners. But exploratory talks and scoping studies already enter a gray area. In any case, the formal launch of negotiations, marked by the exchange of draft texts and negotiation positions, would cross a red line as this would inevitably undermine the EU’s CCP as its trading partners would always hold the UK’s position against the EU’s. This is most salient in cases in which trade negotiations between the EU and third countries are ongoing or in preparation. The capacity of most countries to negotiate trade agreements is limited. Indeed, the efficiency of conducting negotiations with multiple countries was one key driver behind the recent trend towards multi-party (megaregional) agreements. As long as the UK is a member of the EU and participating in the CCP, it may not negotiate trade deals on its own.

Finally, a fourth objection takes the realist view that the UK could simply ignore these restrictions because there is no credible threat of enforcement. While it is true that taking the UK to Court would be pointless, it seems likely that the UK will adhere to the rules. This is for two reasons: non-judicial enforcement and compliance out of self-interest. The EU may exert pressure on third countries to refuse negotiations with the UK while it remains an EU member state. Statements by the Australian Trade Minister, according to which he was informed that starting talks before Britain has formally cut ties with the EU would not be legal, point to remarkable knowledge of EU law among Australian legal advisors—or more likely a timely intervention by the European Commission’s trade team. Even more importantly, it is in the UK’s self-interest to avoid violations of EU law as this would jeopardize the prospects of a mutually beneficial accord with the EU. As it turns out, there is a way for the UK to negotiate its own trade agreements without violating EU law: giving back control.

4.3. Giving back control is possible

The possibility of “giving back control”—i.e., empowering the UK to conduct its own trade policy prior to formally leaving the EU—has attracted surprisingly little

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71 TEU, supra note 2, art. 4(3)(3).
72 The UK government has indeed published a vacancy notice for trade lawyers in February 2017, available at https://perma.cc/M3A7-3RPW.
73 The EU is currently negotiating trade agreements with 25 countries, including Argentina, Brazil, India, Indonesia, Japan, Malaysia, Paraguay, Thailand, and the United States. In addition, the EU is engaged in the multi-country Trade in Services Agreement (TiSA). See for an overview the relevant website of the European Commission’s DG Trade, available at http://ec.europa.eu/trade/policy/countries-and-regions/agreements.
Empowerment by the Union is an exception to the rule that member states may not act in areas of exclusive competence. The EU Treaties leave open the question of the possible form and substance of such empowerment. This was a deliberate choice by the Secretariat of the European Constitutional Convention when drafting the ill-fated Constitutional Treaty, when confronted with conflicting proposals which sought either to delete the reference to empowerment altogether or to specify it further.

Recent EU practice suggests that empowerment requires an act of secondary legislation in accordance with the legislative procedure that applies to the area of competence concerned. On various occasions, the EU has authorized member states to ratify international agreements “in the interests of the EU” that fell at least partly within EU competence but could not be joined by the EU itself because membership was restricted to states. In three instances the EU established procedures for the negotiation and conclusion of international agreements between member states and third countries even though the EU could have taken action itself: In the first two cases, the EU (then the EC) allowed member states to negotiate and conclude new agreements on judicial cooperation in civil matters despite the EU’s competences in this area. In the second case, the EU established transitional arrangements for existing bilateral investment agreements between member states and third countries and laid down conditions under which member states are empowered to amend or conclude such agreements. Empowering the UK to conduct its own trade policy would follow the same model.

With the notable exception of Marise Cremona’s intervention, see supra note 6.

TFEU, supra note 2, art. 2(1): “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts” (emphasis added).

European Convention Secretariat, Draft Constitution, Volume I—Revised text of Part One, CONV 724/1/03 REV 1, May 28, 2003, at 67: “While some amendments request deletion of the reference to the need for empowerment by the Union, other amendments call for the content of the empowerment to be specified further. Consequently, the Praesidium suggests retaining the current wording which leaves room for manoeuvre on the form and content of empowerment by the Union.”

This applies in particular to conventions of the International Labour Organisation (ILO); see, e.g., Council Decision (EU) 2015/2071 of Nov. 10, 2015 authorising Member States to ratify, in the interests of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation as regards Articles 1 to 4 of the Protocol with regard to matters relating to judicial cooperation in criminal matters, O.J. L 301/47, Nov. 18, 2015.


A regulation,\textsuperscript{81} enacted in accordance with the ordinary legislative procedure, i.e. joint adoption by the European Parliament and the Council on a proposal from the European Commission, would re-empower the UK to negotiate its own trade deals. The exercise of this power could be conditioned on prior approval by the European Commission (to avoid a direct clash with EU trade negotiations) and subjected to ongoing efforts of information sharing and coordination between the UK’s Department for International Trade and the European Commission’s Directorate-General for Trade.

It has been suggested that re-empowerment must only be transitional because any permanent reallocation of power would amount to de facto treaty change in circumvention of the treaty amendment procedures.\textsuperscript{82} In the case of a withdrawing member state re-empowerment should be aligned to its status as a withdrawing member state and hence either being terminated by leaving the EU (at which moment all EU law ceases to apply) or by revoking the decision to withdraw (thereby halting the withdrawal process).\textsuperscript{83} This would mitigate any danger of permanent circumvention. In any case, the EU could always repeal the re-empowerment regulation to resurrect the status quo ante.

An additional complication arises because re-empowerment of a single member state is in conflict with the general principle of equality of member states.\textsuperscript{84} Special exemptions from, or qualifications of, Treaty commitments exist in the form of transitional arrangements in accession agreements and special protocols.\textsuperscript{85} But any deviation via secondary legislation is surely in need of some form of special justification. I would argue that the special circumstances of a withdrawing member state justify special treatment. Once a member state has notified its intention to leave the EU, it assumes a status in which it is still subject to all rights and obligations under EU law, as we have seen, but its trajectory has shifted from staying a member in an “ever closer union” to leaving it. Unlike suggestions for somewhat automatic adaption to the new situation, re-empowerment would be a way to accommodate the interest of the UK to negotiate its own trade agreements without violating EU law. This would provide legal certainty and would allow for sensible procedural arrangements that implement and concretize the general principle of sincere cooperation.

To be clear, I am not suggesting that the principle of sincere cooperation requires the EU to reempower the UK to conduct its own trade policy. As a general principle, it can be easily interpreted in different ways, and can be enlisted on both sides of many

\textsuperscript{81} Based on TFEU, \textit{supra} note 2, art. 207(2).
\textsuperscript{82} Cf. KLEMMENS H. FISCHER, \textit{DER EUROPÄISCHE VERFASSUNGSVERTRAG} 139 (2005) (referring to the equivalent provision of the Constitutional Treaty).
\textsuperscript{83} See for “exit from exit” \textit{supra} Section 2.
\textsuperscript{84} See for an argument based on that principle Advocate General Cruz Villalón’s Opinion in Case C-336/09 P, Poland v. Commission, ECLI:EU:C:2011:860, para. 20 (with further references in footnote 19).
\textsuperscript{85} Cf., e.g., Croatia’s Accession Treaty, art. 41, O.J. L 112/6, Apr. 24, 2012 (allowing for transitional measures for a period of three years to facilitate Croatia’s implementation of the common agricultural policy); also see the long list of exemptions enjoyed by the UK under Protocol (No. 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, O.J. C 202/284, June 7, 2016.
controversies. The debate about continued WTO membership of EU member states is instructive. When the German Constitutional Court rendered its Lisbon decision, it claimed that “[t]he Treaty of Lisbon may at any rate not force the Member States to waive their member status [in the WTO].”  This statement triggered an ephemeral debate about continued WTO membership of EU member states in light of exclusive EU competence for trade. Both sides in this debate tried to build a case based on the principle of sincere cooperation. Those arguing in favor of continued WTO membership of EU member states thought that this principle required the EU to respect member states’ desire to stay WTO members by re-empowering them to retain at least “formal” membership status. Those in favor of EU-only WTO membership argued that the same principle required EU member states to respect the (new) division of competences by withdrawing from the WTO. Unsurprisingly, this debate went nowhere.

Re-empowering the UK to conduct its own trade policy might be a different story, if all sides came to the conclusion that doing so is in their common interest. If sufficient procedural safeguards were in place to mitigate the risk of interfering with ongoing or future EU trade negotiations, the EU might be willing to consider this idea. It could be part of an initial agreement to negotiate the future economic relations on the basis of a comprehensive free trade agreement or to establish at least transitional arrangements. It might also lay the groundwork for continued cooperation between UK and EU trade negotiators even after Brexit. Such cooperation will surely be needed. For instance, the EU and the UK might want to work together to withstand the expected backlash in the WTO where both the EU and the UK are likely to face demands for compensation for nullification or impairment under article XXIII GATT. They could also seek to accommodate the desire of businesses to preserve established value chains post-Brexit by negotiating additional arrangements for rules of origin allowing for diagonal cumulation between the EU, UK, and their respective trading partners.

86 Bundesverfassungsgericht, June 30, 2009, 2 BvE 2/08 (Lisbon), para. 375.
89 As suggested by Weiler, supra note 1.
91 Diagonal cumulation allows for shared production in more than two countries while retaining the benefits of fulfilling the relevant origin rules. The compatibility of such arrangements with WTO law is questionable in light of art. XXIV(4) GATT. See also Shanker A. Singham & Victoria Heinson, Brexit, Movement of Goods and the Supply Chain (Feb. 2017), available at https://perma.cc/CA6E-7227 (considering a duty free regime for imports of component products as an alternative). Such arrangements also raise intricate questions under WTO law; see Lorand Bartels, Appendix 1: The WTO Legality of a Duty-Free Regime for Imports of Component Products Used in Exported Final Products, in Singham & Heinson, at 33.
5. Conclusion

I have argued that a cooperative approach towards Brexit is not only preferable for political and economic reasons but is legally required by virtue of the principle of sincere cooperation. The principle can be applied to virtually every dimension of the Brexit puzzle, not just trade. Its value in terms of explicit guidance is limited, but the principle can help to shape the withdrawal process and provide an important narrative that is tailored towards the unique character of exit negotiations.

“Cooperative Brexit” is in the interest of the British government because it will enhance its chances to disentangle the UK from the EU without unleashing economic disaster. But it is also in the interest of the Union, which would also suffer from economic disruption and run the risk of derailing its legislative agenda by confrontational Brexit negotiations. Cooperative Brexit is also a chance for the EU to prove to a doubting world that its model of voluntary supranational governance is superior to national unilateralism, without any need to punish those who decide to take the latter course.

In the end, only diehard “remainers” have a perverse incentive to hope for negotiations in a spirit of hostility and conflict because they would likely result in a terrible deal, or no deal at all, which would in turn increase—if only ever so slightly—the probability of the UK ultimately staying within the EU. If there is a deal, the British government has promised to subject it to a vote in Parliament.92 Most observers assume that it will find itself in the same situation as the Greek government during the summer of 2015: It will have to accept the terms of the agreement to avoid unregulated (and economically disastrous) exit,93 caused by the automatic exit that is built into article 50 TEU. But recall that article 50 TEU was designed to allow for a mutually agreed exit solution while preserving the right to exit unilaterally without a deal. If the political circumstances in 2019 are such that the public sentiment has shifted against Brexit and there is effective political opposition against the current government’s approach, it might be possible to frame Parliament’s decision on the withdrawal agreement as a decision on withdrawal itself.94 If not, the UK will indeed leave the EU and their cooperation will no longer be one between members but between neighbors.95

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92 Brexit White Paper, supra note 4, at 11.
93 See, e.g., Eecckhout & Frantziou, supra note 34, at 2: “Even if the British parliament disagrees with the terms of any agreement, it will need to approve it, or there will be no agreement at all.”
95 According to TEU, art. 8 “[t]he Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.” (emphasis added).
Changes to the Masthead

After many years of dedicated service to our Journal, Professor Juliane Kokott, Advocate General at the ECJ and one of the founders of I•CON, has stepped down from our Board of Editors and has joined our distinguished group of Emeritus Editors. We welcome Professor Rosalind Dixon to the Board of Editors and Professor Cora Chan, Professor Erika de Wet and Professor José Manuel Díaz de Valdés to the Scientific Advisory Board. In addition, Professor Sujit Choudhry has stepped down from the Editorial Board and will continue his involvement with the Journal as a member of the Scientific Advisory Board. Finally, Professors Victor Ferreres Comella, Stephanie Palmer and Adam Tomkin have stepped down from the Scientific Advisory Board. We offer our warmest thanks and appreciation to our outgoing members for their valuable contribution to I•CON.

In this Issue

This issue is a first for I•CON. We dedicate practically the entire issue to one region—in this case Latin America.

Professor Rodrigo Alvarez has kindly written an Introduction to the issue for which we are grateful.

In our Articles section, Daniel Brinks and Abby Blass offer a new conceptual framework for understanding judicial empowerment. They discuss that framework in the context of Latin American experiences of judicial reform. Juliano Zaiden Benvindo then examines the Brazilian constitution-making process in 1987–1988, and argues that the literature on regime transitions seems to ignore the important role that civil society groups play during transitions to democracy, such as the one that took place in Brazil.

The Symposium section features three papers on the theme of “Democracy and Regional Human Rights Courts: Enemies, Allies, or Both?” First, Andreas Follesdal examines whether the Inter-American Court of Human Rights should borrow the margin of appreciation doctrine from its European counterpart. Leiry Cornejo Chavez then analyses the various aims pursued by the remedies provided by regional human rights courts in cases of human rights violations, and uses selected decisions from the European and the Inter-American Courts to show how their rulings have moved beyond the principle of compensation. The symposium concludes with a contribution by Marisa Iglesias Vila, who discusses the normative implications of the approaching inclusion of the subsidiarity principle and the margin of appreciation doctrine in the preamble of the European Convention on Human Rights.

In our I•CON: Debate! section, Jorge Contesse contends that in order to maintain its legitimacy, the Inter-American Court of Human Rights should engage in legal dialogue with non-state actors and states that are fully democratic. Paolo Carozza and Pablo Gonzalez Dominguez respond, arguing that Contesse’s approach fails to reflect the nuances of the “conventionality control” doctrine, and that a more complex perspective better fits the agenda of multi-level judicial dialogue. Contesse answers in a Rejoinder.
Our Critical Review of Governance section offers two articles. First, Jorge Gonzalez-Jacome discusses “abusive” and “authoritarian” constitutionalism in Latin America (particularly in Venezuela and Colombia) and argues that the idea of constitutionalism in Latin America is more nuanced than the recent literature focusing on the notions of abusive or authoritarian constitutionalism seems to assume. Sergio Verdugo then uses the experience of the 1970–1973 Chilean Constitutional Tribunal to discuss explanatory theories of judicial review.

The Critical Review of Jurisprudence section includes two reports on domestic constitutional developments compiled by the “I.CONnect Year 2016 in Review” project: a report on Brazil and one on the Commonwealth Caribbean.

We close with a special Book Review section exclusively focused on Latin American public law.

JHHW and GdB