Mark Jacob’s paper offers an extensive tour d’horizon of the various actual and potential collisions, tensions and overlaps between international investment and human rights law, tracing their history, doctrinal strategies at reconciliation, and avenues for law reform. While comprehensively detailing the “humanitarian internationalist’s” perspective on the relationship between the two bodies of international law, Jacob himself keeps a critical, and frequently ironic distance, ending his observations with a critique of the (mainstream) international lawyer’s “internal management techniques,” his shying away from expressing a clear view on “the perfect society”. If I understand Jacob correctly, he calls on international lawyers to concretize their vision of a good society rather than to rehash doctrinal exercises already well-known from the “trade and…” debates and revolving around interpretation and norm conflict. The process of choice, for Jacob, to achieve the legal framework for the realization of this vision (however it may look) is the political process.

I share Jacob’s skepticism about the usefulness of doctrinal techniques in revealing the relationship between investment law and human rights and agree that international lawyers should focus more on politics. While there is surely a need for further doctrinal work of the type suggested by Markus Krajewski in his comment, I also think that it is high time for international lawyers to activate their “transformatory imagination” and come forward with visions of a good society to guide their legal analyses as well as politics. The relationship between economy and society, of which the relationship between investment law and human rights is one aspect, will take center stage in such visions. Addressing this

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3 In general international lawyers seem to be rediscovering politics and politicization as an object of study after a long preoccupation with legalization; see e.g. A. v. Bogdandy and I. Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 *German Law Journal* (2011), 1341.
relationship will require more, however, than a mere cost benefit analysis as Jacob seems to suggest in his conclusion. In particular it requires a transcending of disciplinary boundaries. In this short comment I will offer some preliminary views on how I perceive the international lawyer’s quest for utopia and politics of paradise.¹⁵

A. Locating International Investment Law in the Utopia of International Law

Human rights – no doubt – are at the core of international law’s utopia.⁶ But where do we locate international investment law? Antonio Cassese’s “Realizing Utopia” gives an indication.⁷ As one materialization of international legal scholarship’s quest for utopia, this edited volume assembles a wide range of eminent international law scholars reflecting on international law’s potential to achieve “an improved architecture of world society.”⁸ Tellingly international economic law is dealt with in a section entitled “What Law Should Be Changed”, a chapter specifically on international investment law is included in a section on the role of international judicial bodies.⁹ The location of international economic law in “Realizing Utopia” reflects its situation in international law scholarship more generally. Public international law scholarship for a long time did not focus on international economic law. Trade law and investment law were mainly the domain of trade and commercial lawyers. This changed earlier for trade law than it did for investment law, but it seems safe to say that today international economic law is right at the center of mainstream international law scholarship¹⁰ – for exactly the two reasons hinted at in “Realizing Utopia”: effective dispute settlement and discontent with the workings of the globalized economy.

With the creation of the WTO a multilateral international organization with an effective mandatory dispute settlement system came into being – a dream come

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² I take the term “politics of paradise” from G. Standing, The Precariat. The New Dangerous Class, 2011, ch. 7.

⁶ Of course there are also critical readings of international human rights law; see e.g. Anthony Anghie’s reading of the integration of human rights into the International Financial Institutions’ development policies as an imperial project, A. Anghie, Imperialism, Sovereignty and the Making of International Law, 2004, 254 et seq. (paperback edition, 2007).


⁸ A. Cassese, Introduction, ibid.

⁹ W. M. Reisman, The Future of International Investment Law and Arbitration, ibid., ch. 22.

¹⁰ For trade law, see only the Max Planck Commentaries on World Trade Law; for international investment law, see S. Schill, Whither Fragmentation? On the Literature and Sociology of International Investment Law, 22 EJIL (2011), 875.
true for many international lawyers. And investment arbitration, too, despite its ad hoc nature meets the desire of international lawyers for binding law enforcement. The second link to the utopian tradition is the perception of international economic law as a threat to international law’s own values. While trade and investment law themselves entail ample promises: of sustainable development, raising living standards, full employment, these promises remain unfulfilled and discontent with the state of the global economy prevails. Extreme poverty persists, a new disadvantaged transnational class – the precariat – seems to be emerging, environmental degradation progresses and domestic democratic politics appear mismatched and impotent to exercise collective agency. In light of these conditions the utopian international lawyer turns to international economic law first and foremost to improve it, to realign it with today’s core of international law’s utopia: human rights.

Jacob outlines the main doctrinal strategies as concerns the realignment of investment law and human rights. The focus is on approaches that I would subsume under the headings systembuilding, and the drawing of domestic analogies. Systembuilding encompasses the attempts to integrate human rights through interpretation as well as the solution of potential norm conflicts through establishing hierarchies and applying conflict norms. Domestic analogies are employed in proposals to analyse international investment law in terms of public law con-

11 For Hersch Lauterpacht mandatory adjudication was essential for an international community under the rule of law, and thus the realization of peace; international judges, for Lauterpacht, were the high priests of the international community; H. Lauterpacht, The Function of Law in the International Community, 1933.

12 The WTO’s preamble formulates these promises as follows: “Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development …”. In 1961 the General Assembly Resolution on the UN Development Decade called on UN Members “[t]o adopt measures which will stimulate the flow of private investment capital for the economic development of developing countries”, GA Res. 1710 (XVI), Para. 2 (d).


14 Human rights arguably have replaced peace as the main telos of international law; see e.g. A. Peters, Humanity as the A and Ω of Sovereignty, 20 EJIL (2009), 513; R. Teitel, Humanity’s Law, 2011. An example for the approach to draw on human rights in order to improve economic law and governance is R. Howse, Fragmentation and Utopia. Towards an Equitable Integration of Finance, Trade, and Sustainable Development, in: A. Cassese (ed.), Realizing Utopia. The Future of International Law, 2012, ch. 33.

15 For a convincing account of why systembuilding may counter fragmentation for the benefit of weaker states, see E. Benvenisti and G. Downs, The Empire’s New Clothes. Political Economy and the Fragmentation of International Law, 60 Stanford L Rev (2007), 598, 630 et seq.
cepts known from domestic administrative and constitutional law, which aim for example at increasing transparency and participation in investment arbitration. Assuming that these approaches are proposed in pursuit of economic governance that is fair, equitable or just they suffer from two shortcomings regarding first their analytical and second their normative potential. Analytically their potential is limited by the narrow focus on public (international) law; normatively it is limited since they attempt to locate utopia within the law. These critiques are also relevant for the proposal to focus on politics. To pursue a politics of paradise we need to locate spaces for contestation and norm creation and formulate visions of paradise.

B. The Quest for a Politics of Paradise

The focus on public (international) law alone makes it difficult to identify responsibility for the ills – persisting poverty, environmental degradation, erosion of the welfare state, increasing inequality (all aspects which may be and are being framed as human rights issues) – that cause our discontents with the workings of markets and their governance. The difficulty of attributing responsibility to international investment law is demonstrated by Jacob’s digging for “Bones of Contention”. To be sure international investment law is not innocent as regards the perpetuation of inequality and limitations on collective agency. There are important arguments to be made that historically international investment law is an imperial project to ensure continued access by the industrialized nations to raw materials from developing countries even beyond the latters’ independence and assertion of sovereignty over natural resources. The potential of investment law to impede collective agency by limiting policy space is detailed in Jacob’s paper. Nonetheless the analysis of investment law (and more generally international economic law) reveals the difficulty of locating responsibility for the injustices of globalization in international law. Is it really trade law that is perpetuating inequality or rather the political bargains struck by individual states? Is investment law that endangers human rights or countries’ un-willingness to regulate corporations? Is investment law unduly limiting freedom to autonomously

16 See the contributions in S. Schill (ed.), International Investment Law and Comparative Public Law, 2010.
regulate or is the voluntary ratification of BITs a legitimate decision to signal the rule of law to businesses?

Looking at international law alone does not tell us much about law’s responsibility since it forms only a tiny part of the norms and institutions that constitute and regulate markets.\(^\text{19}\) If we want to understand how law shapes the global economy and how it contributes to poverty, inequality, or loss of agency we need to extend our framework of inquiry beyond the formal sources of public international law. Within international law scholarship a widening of the body of norms that form the realm of inquiry is already taking place. The soft law debate centers on legal instruments not encompassed by traditional sources doctrine\(^\text{20}\) and, more importantly, the Global Administrative Law project is an attempt to better grasp global governance through the analysis of public and private institutions that engage in administration or affect domestic administrations.\(^\text{21}\) The advantage of such an enlarged focus with respect to the utopian quest is not only that it enhances our understanding of the role of law in global governance. Moreover it allows the scholar to look for sites of legitimacy, such as accountability mechanisms, in places which are beyond the view of the international lawyer guided by the formal sources.

Another, more far-reaching and in my view more promising, approach is to analyze the role of law in the global economy from the perspective of transnational law, first proposed by Philip Jessup and including “[b]oth public and private international law […] and] other rules which do not wholly fit into such standard categories.”\(^\text{22}\) A transnational law analysis is less guided by a disciplinary field, such as human rights law or investment law, but rather by actions or events such as foreign direct investment. Adopting a transnational law approach to investment we cease to be preoccupied with investment treaties and investor/state arbitration, but extend our attention to other actors such as the International Financial Institutions, citizens, NGOs as well as further bodies of norms including structural adjustment programmes, codes of conduct such as the Equator Principles, concession contracts, domestic laws implementing industrial pol-

\(^\text{20}\) For a critique of this widened focus, see J. d’Aspremont, Softness in International Law. A Self-Serving Quest for New Legal Materials, *19 EJIL* (2008), 1075.
icy. We proceed by way of a mapping of actors, norms and norm creation processes.23

Our drawing of the map requires, however, a normative underpinning, a valuation that is made explicit. This is required as much to determine what we are looking for as for our evaluation of what we see on the map.24 Human rights law readily offers itself as such a normative basis. Its attractiveness and pervasiveness in normative legal scholarship seems grounded in the fact that human rights are legal concepts, that drawing on human rights we need not leave the realm of positive law, but may critique and reform the law from within.25 However, human rights law is too indeterminate, the institutions laying claim to authority in interpretation too manifold for the argument grounded in positivism to be convincing.26 Moreover the focus on human rights ignores other, possibly richer conceptions of “paradise.” As Jacob notes it runs the danger of sideline

ing justice (p. 40). In my view it is intellectually more honest to search for a normative basis outside the law in moral philosophy or political theory. This normative basis can be a theory of rights, it may, however, also entail ideas of moral duty and global justice.

International law scholarship has not always been as weary with regard to the formulation of normative visions not grounded in positive law. Examples of scholarship going beyond the utopianism expounded in “Realizing Utopia” are B. V. A. Röling’s thoughts on a new world-law27 or Mohammed Bedjaoui’s exploration of international law in the service of a new international economic order.28 Röling and Bedjaoui formulated their visions at a time when the inade-

23 For a research project adopting a transnational law approach to foreign direct investment, see Christian Kirchner, Erich Schanze et. al., Rohstofferschließungsvorhaben in Entwicklungsländern, 1977.
28 M. Bedjaoui, Towards a New International Economic Order, 1979; for a recent suggestion on the reorganization and reimagining of the trade regime guided by a vision of ca-
quacy of the European International law to address global inequalities and threats of nuclear war seemed apparent. Today we might see ourselves at a similar junction – increased inequality and decline of democratic collective agency calling for a politics of paradise informed by transnational legal analysis.
