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Reforming International Investment Law: Opportunities, Challenges, Paradigms

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REFORMING INTERNATIONAL INVESTMENT LAW:
OPPORTUNITIES, CHALLENGES, PARADIGMS*

Panel Two, “TPF and ISDS”

Chair: Professor Frank J. Garcia, Dean’s Global Fund Scholar, Boston College Law School, and Member, Board of Editors, *Oxford Journal of International Economic Law*

Panelists:

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Prof. Dr. Eric De Brabandere, Professor of Dispute Settlement Law, Leiden University Law Faculty; Editor-in-Chief, *Leiden Journal of International Law*

Ms. Rachel Thrasher, JD, MA, Research Fellow, Pardee Center, Boston University

Prof. William “Rusty” Park, Co-Chair, ICCA/Queen Mary Task Force; Professor, Boston University Law School

Opening Comment by the Chair: Although TPF (which we can define loosely as dispute funding structured as an investment by non-parties) has only recently been on the upswing and was for a long time illegal in most common law and civil law jurisdictions, it has already generated a lot of interest and controversy in its short but meteoric rise.

Today we have the opportunity not only to consider and evaluate the Task Force Report as a response to both the opportunities and risks of TPF, but also to consider TPF itself in the larger context of the future of international investment law: what role does it play, and what role should it play, if we look at investment law from a fairness and governance perspective?

Comment by Mr. Leo Gargne: As stated by the E15 Task Force on Investment Policy launched by ICTSD (International Centre for Trade and Sustainable Development), the ‘current ISDS system conceptually suffers from a tension between its public governance functions and its set-up as a private dispute settlement mechanism that is modelled on how private-private disputes are settled in commercial arbitration.’”

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Despite mentioning, and describing in part, the larger debate over the legitimacy of the investment arbitration regime, it seems like the Task Force, in Chapter 8 of its Draft Report, did not address TPF as what is it, that is, evidence of a larger asymmetry that exist within investment arbitration under the current regime. There is a growing consensus about the need for reform with regard to ISDS. Indeed, it is primordial to insure that states have enough policy space and have enough control over the system. Past disputes in investor-state arbitration reflect how the balance has tilted in favour of investors, even though there exist legitimate governmental concerns and social values at stake. The effect and impact that TPF has within the investor-state dispute settlement system is only another illustration of the misalignment described by the E15 Task Force.

Indeed, it appears that TPF, despite its advantages in commercial arbitration or domestic litigation, might play a negative role in this legitimacy crisis within the ISDS framework as it tilts further still the balance in favour of the investor. The impact of third-party funding is certainly different in a system where one party, the respondent state, which acts as a sovereign entity, is accountable towards its citizens and its government. In that respect it is worth noting that even though in principle third-party funding is also available to respondent states, because funders are profit-driven entities and because states cannot bring counterclaims in investment arbitration, funding states is much less appealing to third-party funders. Further, it might be tricky for the state to justify itself to its constituents as to why it has to pay the third-party funder a return for an uplift even though it won. But more importantly, a funded state would have to give up some of its control over the management the case and the arbitration strategy.

TPF is often seen as granting greater access to justice to impecunious or risk adverse claimants. The logical result of this is that it allows for a higher volume of cases to be brought before arbitral panels. While this would be something to be pleased with if all additional proceedings brought because of TPF were meritorious, nothing is less certain.

It is important to note that, given that most third-party funders are profit-driven entities, they have no interest in the substantive issues presented before the arbitral panel. Consequently, they are more likely to invest in claims having the potential for high volume awards. And indeed, there is no empirical evidence that small investors compared to big companies benefit from this form of financing. The Task Force seems to simply accept the argument of access to justice, just like the fact that TPF is here to stay. However, it seems important to question even this premise. Is recourse to third-party funding a necessity or a mere corporate finance decision? Who is really requesting third-party funding today, small investors or big companies? Indeed, other means of recourse are available. It appears that getting specific information about the

nature of cases third-party funders finance is tricky, as third-party funders are the only ones holding this kind of information.

Moreover, the assertion that third-party funding does not bring more frivolous claims because of the due diligence and screening process funders go through before financing a claim seems to only partially reflect economic reality. In fact, funders usually adopt the same business model as insurance companies and often form a portfolio of cases, enabling the funder to adopt a more speculative attitude and undertake “risk diversification strategies.”

On the other hand, there is a very real potential for an increase in the number of international investment arbitration cases that could have a very significant and negative impact on states, and developing states more specifically. The damages awarded in investor-state disputes are colossal. Further, even if the claim or claims are rejected, the reputation of the host state as a favourable jurisdiction for foreign investment might be tarnished. But more importantly, there is no general rule on how the costs of the proceedings should be allocated. Therefore, even if the state wins, it might have to pay for the costs it incurred to defend itself. If the American rule applies, or even the German rule to some extent, the state will have to bear some of these costs.

This deterrent effect makes a further asymmetry in a system where the state is always defendant and cannot take counter-claims. This entails that the funder always gets paid from responder states. In essence, states are the sole payers of TPF investment arbitration. Another problem—states’ money comes through tax revenue. Allowing third parties to have an effect on this is problematic. Therefore, there is a serious risk that TPF will pose a significant burden on states and affect regulation. Once again, this reflects a larger problem—the existing asymmetry in investment treaties.

Funders are not parties to the investment arbitration strictly speaking, but by offering financing they gain control and economic power over the claim. They can therefore influence the management of the case and ultimately the outcome of the dispute between the investor and the respondent state. In that respect, an issue that was only briefly touched in the Report is that TPF might modify the law by bringing more marginal cases with new issues, which is a different issue than that of frivolous claims. This is illustrated by the fact that, however infrequently, it may be that some third-party funders have engaged in not-for-profit financing. One of the reasons motivating funders to finance such cases is the hope to create a favorable precedent that would favor them in future disputes. The case *Quasar de Valores SICAV S.A. et al. v. The Russian Federation*, under the SCC, is a good example of that. In this context, is the State’s development a factor in the third-party funders’ selection process? The same question arises when considering the State’s experience and expertise in defending itself against investor’s claims.

In conclusion, investor-state arbitration was not designed to help big multinational companies challenge states for trying to implement legitimate, non-discriminatory measures adopted in good faith and regarding tax, the environment, labor laws, or even human rights. Some players have taken advantage of these systemic deficiencies within the ISDS framework. There is a troubling lack of obligations on the investor's end in the system today. And even if the legal standards contained in most BITs have been applied differently depending on the arbitral panel, we can see a general trend emerge, which is that of very liberal, expansive, and pro-investor interpretations of the legal standards set out in investment treaties.

There is certainly a need for a reform that would bring back international investment arbitration to its roots, which have more in common with public law litigation than purely private commercial litigation. It is, therefore, paramount that some form of regulation limiting the number of funded cases be adopted.

Comment by Prof. Dr. Eric De Brabandere: I will focus on the question of disclosure of TPF agreements, and talk briefly on transparency.

It's true that we have seen an increase in the use of TPF. We've also seen an increase in attempts to try to regulate it. There is a tendency for the EU Commission to be against TPF, but at the same time they want to open up arbitration to small and medium enterprises (since it is currently hard for them to engage without outside funding). Perhaps for this reason the Commission is keen on including it in new international negotiations, though I'm not sure if the regulation they proposed is the best—you have to disclose TPF, but there is no sanction to non-disclosure.

It's generally very difficult to regulate TPF, to come up with a sound regulation, with one exception, disclosure.

Opponents worry that disclosure adds costs, extends the time of arbitration, etc. However, recent cases support the idea that you can no longer keep it completely secret. There is a general tendency toward transparency, but the principle alone is not enough to justify full disclosure of TPF, though there are tribunals that have ordered disclosure of TPF. We need something more, which is what I will discuss now.

If you have rules of impartiality that you apply towards counsel of claimants, why not apply the same principle to TPF? This of course implies that TPF parties have some control over the arbitration. That's not always very clear when you talk to TPF funders, but in practice it affects choice of counsel and arbitrator, the strategy, etc.

Disclosure is necessary in investment arbitration because of certain specific features. There are similar applicable laws, awards are usually made public, and it is therefore easy to identify the particular vision of an arbitrator on a

particular issue, either through majority or dissenting opinions. It's important that you have a strict impartiality and avoid conflict of interest.

This is why issue conflicts—individuals acting as counsel and arbitrator in a different cases—poses a distinct problem in investment arbitration. As to repeat appointments of arbitration, appointed three times by the same party, that is a situation that will put you on the orange list in the IBA Guidelines on conflicts of interest.

This is a matter of principle, and many tribunals have accepted this. The IBA 2014 Guidelines also have followed this and expanded the definition of third-party to include funders. Also, many tribunals if they are aware (and this is the difficult part, knowledge) request disclosure of both existence of agreement and identification of third-party.

It should be noted that what is targeted by the standards, is appearance of bias and not actual bias. It has been argued by TPF proponents that if you don't know there is a funder you can never have a conflict. Practically this may make sense, but it is flawed as a principle. We are not talking about whether the arbitrator has been appointed by the same state or if the arbitrator actually is biased, because the standard tackles the appearance of bias, not actual bias. And just because you keep TPF a secret, it does not mean that you avoid a later conflict.

My final point concerns the potential negative effects of TPF. There are more and more requests for security for costs by the other party, when they know that the claim has received funding. Again, there is the perception that funding is only sought by claimants in dire need of funding, but this is not always true. Still, there's a tendency of states requesting security for costs, and in fact granted in one specific case, *RSM v. St. Lucia*. The dissenting opinion by Gavan Griffith said you should *always* order security for costs. Since then, many states involved in investment arbitration have made a request for security for costs.

Can they do this? Of course. Should they do it? That's another question. I have no strong view. It's a combination of various issues, and depends on specific reputation of other party, what's at stake. The mere presence of TPF is not in my view a reason alone to request security.

Comment by Ms. Rachel Thrasher: This is an attempt at a framework for understanding third-party funding. In particular, regarding the Chair's question of fairness, what are we looking for in terms of reform: "Justice for whom?"

Since this has been covered somewhat in the previous two presentations, I won't discuss the origins of TPF in too much detail. TPF beginnings are found in domestic litigation, with an upsurge in international commercial arbitration and investment arbitration during the financial crisis. This may be due to sev-

eral factors, one being corporations and investors experiencing economic difficulty yet wanting to pursue meritorious claims. Another factor may be investors seeking alternative capital outlets, where the returns would not be correlated to traditional markets.

TPS proponents have several main arguments. One is “access to justice”—that people would have their claims decided before an impartial tribunal. Two is availability for both “sides”—it’s an argument for fairness, that this creates opportunity for everyone. Three is that TPF promotes disinterested, dispassionate and highly detailed assessment of claims, and that funders are even better in this way than attorneys. Four is that TPF is just like other types of funding—it should be treated the same. Five, related to four, is that it has wide use in domestic courts and international commercial arbitration, so it’s a legitimate way to fund cases in general.

First, let me address “Access to Justice.” The quintessential complainant for purposes of third-party funding in general is the impecunious individual or corporation who simply does not have the money to bring a case—largely because of the wrong-doing of the prospective defendant. The norm in international arbitration today is the growing corporate utilization of TPF by large, well-resourced entities looking to reduce risk or take the cost of arbitration off of their balance sheets. We’re simply not looking at the impecunious client. Other evidence against the importance of TPF for “access to justice” is that there are other funding availabilities, which I’ll discuss shortly, which suggest that clients in need of money have other alternatives for funding their cases. Given the availability of other funding alternatives and the possibility of litigation in domestic courts, there are other options. TPF may not be holding together “access to justice.”

Second, Equal Use. Again, the evidence shows that use of TPF is unequal. The argument that TPF is available to states as well as investor-claimants is supported by some anecdotal evidence only. There are only two cases of states receiving TPF. One, we’ve heard about several times this morning—*Philip Morris vs. Uruguay* (where public health considerations were an issue which mobilized civil society to provide support), and *RSM Production Corporation vs. Grenada* (where the funder had a political interest in the State prevailing).

TPF is highly asymmetric, essentially throwing a bunch of additional funding toward one side of an already unbalanced system. Proponents of TPF also argue that portfolio funding could be used to fund defendant cases—by not always having to have high return cases, you can free up funding for more types of clients. But that’s not the way portfolio funding has been used in general. Portfolio funding is in place to handle high risk/high reward cases balanced against low-risk/low reward cases, not pro-bono funding or low-return defense cases. There is also the concern that state money is taxpayer money, so if the state made an agreement with a funder, in which the funder received a

return on the outcome of the case, it's possible that this is outside the legal power of states to provide given their role as a sovereign state.

Third, Disinterested and Dispassionate Assessment. Funders have argued that it's simply bad business to fund cases without merit. Actually, quoting Mick Smith, co-founder of Calunius Capital, which is a funder in the US dispute market, "The perception that you need strong merits is wrong—there's a price for everything." Funders are constantly seeking out innovations to fund all types of cases. Furthermore, the interconnectedness of the TPF community is well established. Its members acknowledge the web of attorneys, arbitrators, and funders working together. This information is acknowledged in the Task Force report. Without desiring to or needing to impute bad faith, this creates incentives to increase the number of cases and perpetuate the system, which speaks against the claim that it is disinterested.

Fourth is Alternative Funding Opportunities. TPF is functionally similar to corporate/equity financing, insurance, and contingency fee arrangements. They each similarly offer non-recourse funding with the promise of a return in the event the funded party prevails. But they also each differ in important ways. Corporate and equity financing is when a corporation funds a case for a subsidiary or branch of the corporation. This is like TPF, but the funder is related to the complainant. The issue of conflicts of interest that could come up in TPF is not as much of an issue here because those corporate relationships are already disclosed. For insurance, the key difference with TPF is that insurance is offered at a much lower cost to the funded party. And there is not a day-to-day financing for things that come up, but a payout at the end. Contingency fee arrangements, like corporate equity financing, are immediately discoverable, so there is no issue of secrecy that could create conflict of interest.

There is also the uniqueness of investment arbitration—the role of states as sovereign entities that have special status, as opposed to private entities in commercial arbitration. I won't spend more time on this as it has been covered extensively already, but as I and others have mentioned earlier, only investors can initiate disputes, giving them almost sole access to TPF.

There are a lot of unknowns about the impact and future uses of TPF, and who ultimately benefits from TPF. We clearly do not have adequate information. In light of this, I argue that we need expansive disclosure of TPF arrangements. This is important for three reasons: to avoid conflicts of interest, to address general transparency concerns, and to provide data for long-term research. First, on disclosure, this was covered well by Eric so I won't go into the details. Briefly, there is general agreement that the existence and identity of third-party funders should be disclosed to avoid conflicts of interest. The only question is, who should disclose it: the arbitrators or the funded party? There is also a larger-scale interest in disclosure, not just in the identity of TPFs, but also in key provisions of the funding agreement.

We have an institutional interest in transparency. For one, the trend is already toward more transparency, not less. This is evidenced by the 2006 modification to the ICSID Arbitration Rule and 2013 Transparency Rules in UNCITRAL. Transparency is about the legitimacy of the system as a whole, so we ought to seek it in all areas.

Second, and this is a repeated theme, so much is still unknown about TPF in international investment arbitration. Proponents speculate that TPF will promote greater and much needed investment in developing countries. Critics say it will drain state balance sheets and lead to a regulatory chill. However, until we have data, we cannot know the truth of either statement. And in order to gather this data, we need to know not only the existence and identity of third-party funders, but also the general structure of these funding agreements, and the financial situation of the funded party, in order to make better decisions for the long run.

Finally, the fact that third-party funding is currently accepted in the realm of international investment arbitration, and the fact that critics calling for it to be banned have been unable to “move the needle” in terms of making practical changes, as some experts have said, is no reason for us to assume that TPF will remain with us forever. International investor-state dispute settlement has been an established institution for more than fifty years. We now know where reform is needed and that’s why we’re here today—to push for that reform. If we said that the current system is here to stay, we would be giving up. The same is true for TPF. For now, we need to regulate with a long-term view to pushing the envelope further where the evidence suggests that we ought to. We should welcome ongoing scrutiny that will bring greater justice, transparency and consistency. And greater disclosure can make this possible.

Comment by Prof. Rusty Park: Those who know French history or have read Shakespeare know that the 25th of October is the anniversary of a famous battle in the One Hundred Years’ War: 1415, the Battle of Agincourt, made famous in *Henry V*. In that play, in one famous scene, the English are about to go into battle with the French, and Earl of Westmoreland says to Henry V, “Sir we are few,” and Henry answers, “We few, we happy few.” The king is happy because it means more honor for each of those soldiers. They won the battle but lost the war fifteen years later.

This phrase “We few, we happy few” comes to mind for investor-state arbitration. There are very few people who are honestly interested in discussing the merits of the subject. It has become a political football, somewhat of a Rorschach text: what you see tells you a lot about who you are. People who look at IS funding tend to see things in it related to a particular political perspective, just as people do who look at arbitration in a domestic context. Yesterday, the US Senate voted 51-50 for a measure to limit class actions in the US. Liberal

papers like the *Times* came out against the vote. But if you were to take the arguments made by liberals, arguments in favor of class action, but substitute the word TPF for class action, because that's what they are, you would get the same argument but left and right would be reversed.

With that general comment, let me go into the devil in the details. There are three musketeers of TPF regulation. (Actually, there are four musketeers). First is disclosure, which was dealt with by previous speakers. Most reject the notion that what you don't know can't hurt you. Second, costs. There are two issues here: one is whether there can be an order for security of costs, another whether costs can be reimbursed at the end. The general rule outside the US is that the loser pays. Can the loser be required to pay the winner's TPF costs? Another issue being discussed is whether a tribunal can order one party to make a disclosure of TPF. This came up in a recent case where a state was ordered to disclose its TPF, which led to a challenge that was rejected. The third musketeer is privilege. People often don't talk about privilege for TPF, but Anglo-American lawyers know only the common interest privilege, where there's no waiver of privilege because documents are exchanged between the two parties. This is an unexplored area, the question of TPF and the common interest privilege. Outside the US and England, privilege does not have the same connotation. Continental countries have professional secrecy, meaning the lawyer cannot make a disclosure, but there is no privilege attaching to a particular document. The fourth musketeer relates to so-called best practices. There are lots of people writing about best practices in TPF. My own tendency is to avoid the word "best practices." In fact, there is a lot of leeway in international arbitration for best practices. There might be bad practices, or good practices, but it's hard to say that there is a "best" practice.

Those who are interested in the Task Force itself should address questions and comments to Catherine Rogers and Stavros Brekoulakis at the Queen Mary Law School in London. Those two co-chairs have taken on themselves the lion's share of the work. And I think that probably at this point this is what the Chair wanted me to say, so I should probably sit down for questions.

Q&A:

Question (Prof. Sonia Rolland, Northeastern Law School): If the investor is a publicly traded company, is third-party funding not already disclosed somewhere in securities documents for shareholders? That is not a substitute for a more centralized debate on this, but does the issue of disclosure become less serious to some extent if that information can be uncovered?

Answer (Eric De Brabandere): This is why in several cases claimants make an official statement confirming they have third-party funding. In other cases, you can find it in documents but claimants are not explicit. But, it is not

always easy to find this stuff out and you do have to go and look for it. Note though that small and medium enterprises are less explicit about third-party funding and are much more careful about being open about outside funding.

Question (audience member): Are there cases where third-party funding brought about issues of bias or conflict of interest?

Answer (William Park): If I understand your question, you're asking are there instances where disclosure has resulted in finding that one of the arbitrators is biased. There are cases where the issue has been raised, though to my knowledge there are no cases where disqualification has occurred.

Question (Prof. Elizabeth Trujillo, Texas A&M Law School): Regarding best practices, why is this not a good way to regulate third-party funding? This seems to be the way regulation is going in trade and investment, taking into consideration input from the private sector, etc.

Answer (William Park): It isn't so much that it's wrong to have good and bad practices set out. What's objectionable is to say that one particular practice is the best, and anything that is not the best is bad. For instance, on the issue of privilege, there is a huge difference in the Anglo and Continental context. Anglo lawyers who write about best practices may forget that half of the rest of the world does it differently, and that professional secrecy requires a different approach. No doubt there are some bad practices and some good practices; my allergy to the term "best" is an allergy to people who believe they know best for everyone in the world, instead of many acceptable practices.

Follow-up question (Trujillo): Is there a common practice evolving?

Answer (William Park): Certainly. One is disclosure. Certainly, there is a bad odor to arbitration if it's found that the same law firm is supplying one person to chair the tribunal and another to advise the third-party funder. But things are not so simple. We talk about the independence of arbitrators, but there are some systems where the arbitrator is not expected to be independent. The narrow community of insurance arbitration in London has a very different view of best practices than in the US or France.

Question (Prof. Sergio Puig, University of Arizona Law School): Do you see potential harmonization given that some arbitral institutions have admitted that one of the advantages is that they reflect different practices and flexibility?

Answer (Eric De Brabandere): There is a lot of competition and they are very careful in adopting regulations to this effect. This is why I'm skeptical generally about regulations, as it's very difficult to imagine a situation where they will be generally acceptable. This competition will probably only in-

crease. I don't see how you can have all institutions agree on what are best practices, they all have very different interests.

Question (Chair): Let me build on that to propose a question to the panel. We've been talking about a range of techniques that are not new to law: disclosure, best practices, conflict of interest rules, etc. There are different ways to understand the deployment of these tools. One would be to assume that, if we have insufficient knowledge, we are not in the best position to make new rules, so let's develop a way to get that knowledge in the meantime through disclosure, etc. Another way to understand their deployment is that we use best practices and disclosure because we believe these are the *right* tools. A third approach might see using these techniques as *distracting* us from the key structural issues. So these are just three different ways these issues can be talked about. I'd like to ask the panelists to each comment on this.

Answer (Leo Gargne): From an academic point of view, there is a difference between international commercial arbitration and international investment arbitration. In commercial arbitration, reform within the system through regulation that's not too strong, like in Singapore and Hong Kong, can be helpful. For investment arbitration, it's more systemic, and a more general reform is needed to tackle third-party funding and the ISDS system and its legitimacy issue.

Answer (Rachel Thrasher): I think that it's useful to use these strategies to create information that we can act on later. Because we lack information, it's not clear how to address the situation. I also think that when I approach this, I see some real fundamental difficulties with the way that investment treaties and dispute settlement and third-party funding are set up in a really asymmetric way. It's possible that by talking too much about the ways to mitigate immediate problems, we are distracting from a larger discussion. So, I think that's a real danger.

Answer (Eric De Brabandere): I don't have much to add, but it depends on who you talk to. International law professors think it's outrageous that someone would finance a claim against a state. If you are looking at the things you can actually regulate, then you look to things like disclosure. Or else you can consider what is in the treaties themselves.

Answer (William Park): One of the points Rachel and others made is that we need to have information before we come up with any good versus bad practices. Another is to be aware of our own positions. Someone who is writing a manual on good practices will have presumed his or her conclusion ahead of time. I mentioned that what is always impressive is how few people look at IS in a dispassionate way. They start out by thinking it's either good or bad.

Right now, the chief spokespeople for both sides think it is bad. Trump did this at the UN, Elizabeth Warren said something similar. Unaccountability is a bad thing. But accountability to whom, the claimant or the respondent? Often people cite the 1872 *Alabama* arbitration as the beginning of international arbitration, between the US and Britain after the Civil War. The decision addressed Britain's allegedly allowing ships to be built in Liverpool that then served the Confederacy to attack the North's commercial vessels. Britain had to pay a huge sum. This is often taken as a paradigm of international arbitration as a peacemaking mechanism, and it did probably prevent the US from invading Canada—this is what Senator Charles Sumner threatened. But when you look at what the arbitrators were actually doing, Charles Francis Adams from US, for example, they were taking instructions from their governments. That's not international arbitration as we know it today. It wasn't a best practice, but it was better than the alternative, which would have been war. So, getting back to good and best practices, we have to remember that things are evolving, and hopefully those who are crafting good and bad practices will start without a conclusion.

Follow-up question (Frank J. Garcia) (directed toward William Park): I'm not asking you to breach any confidentiality, but one can't help notice that the chapter at the end of the draft report on third-party funding reads stylistically very differently than the others, because (as it mentions) there was strong division over what that recommendation should look like. Are the different opinions we just covered also present on the task force itself?

Answer (William Park): There was strong division.

Question (audience member): China is interested in developing its own third-party funding mechanisms as part of its growing commitment to arbitration, do you have any recommendations for us?

Answer (William Park): Feel free to share my contact information and I'd be happy to send them the report.

The Chair brought the session to a close at 12:30pm Wednesday, October 25, 2017.