

## 2009 FDI MOOT COMPETITION ADAPTATIONS

In order to allow the greatest number of teams to be involved in the Orals for the longest possible time and to promote even assessment across more than 60 memorial judges and arbitrators, we have undertaken some modifications to the competition.

### MEMORIALS AND COUNTER MEMORIALS

Memorials (and then counter-memorials) will be paired to compete on the basis of a [Swiss tournament](#)<sup>1</sup>. A victory is determined by each memorial judge according to the quality of analysis of the issues involved, persuasiveness of the arguments, logic and reasoning, writing, knowledge of the facts, use of authorities and extent of the research.

### ORALS - TEAMS

We will split the teams into two groups. In each group, the teams will also compete on the basis of a Swiss tournament over 6 rounds. A team wins a match if a majority of the arbitrators have given its advocates higher aggregate scores than those of the other team.

In the semi-finals, the 1<sup>st</sup> ranked team of one group will face the 2<sup>nd</sup> ranked team of the other group and vice versa. The semi-final victors will face each other in the final. In the semi-finals and final, the roles of claimant and respondent will be assigned by lot.

### ORALS - INDIVIDUALS

Given the greater minimum number of rounds in which advocates may argue (six rather than four) Rule 8.2 is amended to consider the best **three** rather than best two preliminary rounds.

We will adjust scores awarded by each arbitrator according to their mean deviation in order to reduce the impact of any “easy” or “hard” graders over the course of the competition.

### HIGHEST RANKING TEAM

Each team’s memorial and counter-memorial scores will be used to allocate between 150 and 300 points to each, and will be added to its aggregate adjusted individual oral scores for Rounds 1-6.

## 2009 MEMORIAL JUDGE INSTRUCTIONS

Over three weeks, judges will receive (in most cases twice) via email as PDF files a pair of memorials to review. In each case you will have 5-7 days to declare a “winner”. You must determine which memorial is “better” according to the quality of analysis of the issues involved, persuasiveness of the arguments, logic and reasoning, writing, knowledge of the facts, use of authorities and extent of the research. You **must** communicate the winner of each pairing to us by the **deadline in given each email**, so that we can pair the memorials for the next round. The same procedure will then be used for counter-memorials.

Judges are also encouraged to append comments to the PDFs (using the [Adobe Reader Commenting](#) function, which we have enabled for the files). The comments may relate to substance, style, observations on the issues involved, etc are due back by **25 October 2009**.

The winning memorial and the winning counter-memorial will be published in the Yearbook on International Investment Law and Policy 2009/2010, produced by the [Vale Center at Columbia Law School](#) and published by Oxford University Press. They will include – with permission – the comments of those who have reviewed the memorials. We are also talking with [TDM](#) about publishing the memorials and counter-memorials ranked 2-4.

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<sup>1</sup> For the purposes of the pairing and scoring, we will use the Sevilla Chess Tournament program with [Bucholtz scores](#).

## **GUIDELINES TO JUDGING ORAL ADVOCACY ARGUMENTS**

Thank you for agreeing to arbitrate oral rounds in this year's FDI Moot. We have prepared the following guide for the oral advocacy rounds before arbitrators. You may find that some of these comments are common to moot competitions generally, while others are particular to the FDI Moot.

### **I. WHO'S WHO IN AN FDI MOOT MATCH**

An oral match pits two teams against one another, one representing the Claimant and the other representing the Respondent (State). Each team consists of either one or two oral advocates who will share the allotted time.

You will be serving as a member of a three-member arbitral panel. The chief arbitrator, the "President", sits in the middle of the panel. The duties of the President are to: (1) signal when the oral advocates may begin or end their arguments; (2) along with the co-arbitrators to question the advocates; (3) to answer procedural questions by the advocates ("May I have one minute extra time to finish my answer?"); and (4) generally maintain order in the proceedings.

The ICSID arbitration rules envisage parties being represented by "agents, counsel or advocates". Therefore, you may hear the advocates refer to "my Co-Counsel" or "the Agent for the Respondent." Arbitrators are addressed as "Mister/Madame Arbitrator or by their titles and surnames (available on the name plates), e.g. "Mr. Berger", "Prof. Loyola". The President may be referred to as "Mister President" or "Madam President."

The Secretary of the Tribunal will aid Arbitrators in the hearing room. Prior to the match, the Secretary obtains the correct spellings of the oral advocates names and each team's time allocation. The Secretary records this information on the score sheets and transmits the paperwork to the arbitrators. At the beginning of the round, the secretary will usher the arbitrators into the hearing room, announcing the case and introducing each arbitrator. During the match, the Secretary must track how much time remains for each advocate's argument and indicate this by holding up cards for the teams and the panel to see ("5 minutes", "3 minutes", "1 "STOP", which indicates the advocate's allotted time has expired).

### **II. THE ORDER OF ARGUMENT**

Each team has 35 minutes to present its case. The team allocates its time among its first advocate, its second advocate, and any rebuttal (or surrebuttal). Before arbitrators enter the hearing room, each team will have indicated to the Secretary how it wishes to divide the 35 minutes among these parts, for which purpose teams must appear before the Secretary at least 5 minutes before the hearing is scheduled to begin..

- The team may announce its time allocation to the panel at the outset of its argument.
- The team need not determine ahead of time which advocate will deliver rebuttal or surrebuttal. This is often a strategic choice, made during the course of opposing counsels' arguments.

The match begins with the President inviting counsel and the audience to be seated. Hearings should be structured as flexibly as the teams may agree (or failing that) as the President directs, so long as basic procedural fairness is respected. The order of presentation in an oral match might be, for example:

<b>Alternative 1</b>	<b>Alternative 2</b>
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## Foreign Direct Investment International Moot Competition - The Skadden, Arps FDI Moot

1. Claimant on Admissibility/Jurisdiction	1. Respondent on Admissibility/Jurisdiction
2. Claimant on Merits	2. Claimant on Admissibility/Jurisdiction
3. Respondent on Admissibility/Jurisdiction	3. Claimant on Merits
4. Respondent on Merits	4. Respondent on Merits
3. Claimant's Rebuttal (unless waived)	5. Claimant's Rebuttal (unless waived)
4. Respondent's Surrebuttal (unless waived)	6. Respondent's Surrebuttal (unless waived)

Teams should discuss between each other **before** the tribunal enters, whether they can agree on an order. If an order is agreed, both teams should so indicate to the tribunal. If there is no agreement, each team may propose an order to the tribunal, but there will be no argument on the matter, and the President shall decide how to proceed, accepting either team's proposal or adopting his or her own alternative. In all cases, the order should be made clear to the Secretary so that he or she can keep time on the oralists. For the sake of the time-keeping, the tribunal should not permit a debate back and forth between the parties' counsel.

If Claimant waives rebuttal (which it may do by informing the panel when the time for rebuttal arises), then Respondent does not have an opportunity to exercise surrebuttal.

At the end of the final argument, the Secretary will ask the Counsel and audience to rise and leave the room. The arbitrators will then begin deliberations (maximum 10 minutes).

When the arbitrators have finished deliberating and have scored the match, the President will instruct the Secretary to bring the competitors and audience back into the hearing room. At this point, court is no longer formally in session; arbitrators may give the advocates feedback on their performance (see below). Arbitrators must not give the teams substantive tips.

If anything inappropriate happens during the match, the President should eliminate the disturbance without unduly influencing the flow of the match, and note this on his or her score sheet under "Comments". The Secretary will notify the Administrator when submitting the score sheets. The Administrator will investigate and assess the appropriate penalties. Oral-match misconduct is uncommon, but includes:

- Team members at counsel table talking to (or receiving notes from) spectators. This is strictly forbidden. For this reason, the use of laptops at counsel table is also prohibited. Without interrupting the advocate speaking, the President should instruct the team to stop the communication.
- Spectators entering or leaving during the match. If repeated movement disturbs the match, admonish the audience to have respect for the advocates.
- Team members leaving counsel table during the match. Inform the Secretary at the end of the match.
- Generally disruptive conduct at counsel table. Instruct the team to have respect for the opposing counsel at the podium.

### III. THE ROLE OF THE ARBITRATOR

Opinions differ regarding the role of an arbitrator in a moot competition. One view is that an arbitrator should ensure that participants complete their entire presentation. Another is that participants are truly tested only when a lively panel engages advocates in a dialogue.

The best panels are able to find a balance between the two. Most observers agree that arbitrators should at least ask questions of a sufficient difficulty and in a sufficient quantity to prevent the competitors from merely reading a rehearsed speech. Participants have worked on

the FDI Moot Problem for several months, and generally appreciate being tested on the material. At the same time, arbitrators should refrain from taking up too much time by asking long questions or making lengthy comments of their own.

Arbitrators must not decide this case on the merits, but instead on the performances of the oral advocates. An arbitrator should evaluate the strength of each advocate's overall presentation, the validity of the participants' arguments, the persuasiveness of their presentation, their poise and advocacy skills, and the thoroughness of their preparation. The score sheet outlines the criteria for the oral presentation.

Please note that oral advocates are not bound by their written arguments. Since written memorials were submitted, subsequent research (and subsequent oral rounds) may lead advocates to revise the substance, style and structure of their arguments.

The oral advocates will assume that the arbitrators are generally familiar with the facts of the case. Therefore, advocates will likely not ask the tribunal if it wishes to hear a recitation all the facts. Instead, advocates may focus only on those facts that are directly pertinent to their legal arguments.

#### IV. HELPFUL HINTS FOR ARBITRATORS

##### A. DURING THE MATCH:

- Utilize concise questions that call for a “yes” or “no” answer. Such questions test an oral advocate's ability to answer directly and clarify the competitor’s position on an issue.
- Feel free to ask “basic” questions, including the nature and sources of international investment law. Such questions ensure that the advocate understands international law and is not merely reciting memorized details.
- Avoid asking rhetorical questions or making lengthy statements that use up the time of the participants.
- Avoid lengthy debates with the advocates. Feel free to press for a direct answer, but avoid monopolizing the advocate's time.
- Question each advocate equally. Evaluating the match is easier when all advocates have been equally tested by the panel.
- Avoid grilling an advocate about his/her teammate's argument. Each advocate should be generally familiar with the team's entire argument, but is not expected to have a detailed grasp of his/her co-counsel's argument. You may, however, explore inconsistencies between the two.
- Respect the time limits on oral argument. The President may generally grant an advocate extra time solely for answering a specific question or briefly concluding the presentation.
- Many competitors are not native English speakers; if you determine that an advocate is not a native speaker, it may be useful to avoid asking long, complicated questions.
- Remember that teams come from different countries with a wide variety of legal resources. Some teams are at a disadvantage in this respect. The FDI Moot issues are intended to be answerable by reference to generally available materials and a careful reading of the facts.

##### B. AFTER THE ORAL MATCH - DELIBERATIONS:

At the end of the match after the competitors and audience have left the room, arbitrators may begin deliberating. Some arbitrators prefer to discuss the match with the other arbitrators, while others do not wish to be “influenced”. Either approach is acceptable. Please do not deliberate more than 10 minutes and remember:

## Foreign Direct Investment International Moot Competition - The Skadden, Arps FDI Moot

- Reasonable arbitrators disagree. Don't worry if you score the match considerably differently than the other arbitrators. "Split panels" are a common outcome in practice and in moot competitions.
- You alone are responsible for your score. While discussions among arbitrators may be useful, do not feel pressured to adjust your scores to match those of the others.
- Do not speak about the merits of the case (or the results of the match) once the competitors re-enter the room, as they may try to interpret comments made by the arbitrators.

### C. AFTER THE ORAL MATCH - ARBITRATORS' COMMENTS TO THE TEAMS:

After the score sheets have been given to the Secretary, the Secretary will ask the advocates and spectators to return to the room, and deliver the score sheets immediately to the Administrator. Meanwhile, arbitrators may give feedback to the oral advocates. Generally, it is nice to preface comments with a brief introduction by each arbitrator as to his or her background (i.e., any arbitration, international law, and current job). Please observe the following rules:

- Do not announce the winner of a match or the scores of advocates.
- Do not give substantive comments to the competitors or suggest alternative arguments to the teams. Substantive advice gives the teams before you an unfair advantage over other teams. You may comment on an advocate's poise, the structure of his/her argument, and other general tips on oral advocacy.
- Do not ask the advocates which school or which country they represent. Oral arguments are anonymous. Even if you are not scheduled to arbitrate again, others may overhear the answer. At the end of the FDI Moot, you may ask the Administrator.
- Please keep your comments brief (in total under 10 minutes). The FDI Moot is run on a tight timetable. Students may need to argue shortly after the match, the Administrator will need the room and the arbitrators for another match.
- Conflicting comments from different arbitrators may confuse oral advocates; remind the advocates that there are many different opinions regarding oral presentation styles. Avoid categorical statements regarding argument style.
- Do not opine that the problem is unbalanced or that one side is "correct", as it may give the advocates the false impression that you favored the advocates arguing the more meritorious side. The point of the FDI Moot is not to determine which side of the argument is more meritorious.
- Never confess ignorance of the subject matter of the problem. Instead, compliment the advocates on their preparation.

**MANDATORY ORAL PLEADING SCORE SHEET**

Arbitrator Name: \_\_\_\_\_ \*

Room (1-17) No.: \_\_\_\_\_ \*      Round (1-6; Semi-final; Final): \_\_\_\_\_ \*

Name of Secretary: \_\_\_\_\_ \*

**ARBITRATOR INSTRUCTIONS:**

Each oral advocate should be given a score between 25 (lowest) and 50 (highest) to reflect his/her performance during the oral argument. In particular, in assessing each advocate, you should take into account his/her:

- (1) knowledge of law (approximately worth 30% of each advocate's score);
- (2) application of law to the facts (approximately worth 25% of each advocate's score);
- (3) ingenuity and ability to answer questions (approximately worth 30% of each advocate's score);
- (4) style, poise, courtesy and demeanour (approximately worth 10% of each advocate's score); and
- (5) time management and organization (approximately worth 5% of each advocate's score).

There are two optional worksheets attached to this mandatory score sheet in case you would like to breakdown your scores using the above criteria or provide additional written comments.

An excellent advocate, who you think is likely among the top 10% of all the advocates in the competition, should be given a score between 46 and 50 points.

A very good advocate, who you think is likely among the top 25% to 10% of all advocates in the competition, should be given a score between 41 and 45 points.

A good advocate, who you think is likely in the top 50% to 25% of all advocates in the competition, should be given a score between 36 and 40 points.

An adequate advocate, who you think likely to be among the top 75% to 50% of all advocates in the competition, should be given a score between 31 and 35 points.

A poor advocate, who you think is likely in the bottom 25% of all the advocates in the competition, should be given a score between 25 and 30 points.

CLAIMANT TEAM:	RESPONDENT TEAM:
1 <sup>st</sup> Claimant Advocate      Score 25-50**  L A S T N A M E, F i r s t N a m e *	1 <sup>st</sup> Respondent Advocate      Score 25-50**  L A S T N A M E, F i r s t N a m e *
2 <sup>nd</sup> Claimant Advocate      Score 25-50**  L A S T N A M E, F i r s t N a m e *	2 <sup>nd</sup> Respondent Advocate      Score 25-50**  L A S T N A M E, F i r s t N a m e *
Comments	Comments

Arbitrator Signature: \_\_\_\_\_ (score cannot be validated without signature)\*\*

\* Secretary may fill in      \*\* Only arbitrator may fill in

**FDI MOOT SECRETARY'S WORKSHEET**

1. Enter the competitors
2. Ask each team (the Claimant and the Respondent) how many minutes each competitor would like to reserve for her or his argument and rebuttal/surrebuttal. Record these times in the boxes numbered 1, 2 & 3 below.
3. When the competitor begins to argue, note the time on your watch. (ie, 9:42)
4. Calculate at what time you must hold up the 5 minute, 3 minute, 1 minute and Stop signs. (ie, if the competitor reserve 27 minutes for argument, and he starts at 9:42, you would fill in "10:04" in the "5 minutes left" box, "10:07" in the "3 minutes left box", etc... (see the examples below).
5. When the watch reaches the designated time, hold up the sign.

Room (1-17) No.: \_\_\_\_\_ Round (1-6; Semi-final; Final): \_\_\_\_\_

Name of Secretary: \_\_\_\_\_

<b>FIRST CLAIMANT</b>	<b>FIRST RESPONDENT</b>
<b>1. Argument Time Reserved (minutes):</b> (ie, 27 minutes)	<b>1. Argument Time Reserved (minutes):</b>
Start Time on Watch: (ie, 9:42)	Start Time on Watch:
5 Minutes Left (ie, 10:04)	5 Minutes Left
3 Minutes Left (ie, 10:05)	3 Minutes Left
1 Minute Left (ie, 10:08)	1 Minute Left
Stop Time on Watch: (ie, 10:09)	Stop Time on Watch:
<b>SECOND CLAIMANT</b>	<b>SECOND RESPONDENT</b>
<b>2. Argument Time Reserved (minutes):</b>	<b>2. Argument Time Reserved (minutes):</b>
Start Time on Watch:	Start Time on Watch:
5 Minutes Left	5 Minutes Left
3 Minutes Left	3 Minutes Left
1 Minute Left	1 Minute Left
Stop Time on Watch:	Stop Time on Watch:
<b>REBUTTAL/SURREBUTTAL</b>	<b>REBUTTAL/ SURREBUTTAL</b>
<b>3. Rebuttal Time Reserved (minutes)</b>	<b>3. Rebuttal Time Reserved (minutes)</b>
Start Time on Watch:	Start Time on Watch:
3 Minutes Left:	3 Minutes Left:
1 Minute Left:	1 Minute Left:
Stop Time on Watch:	Stop Time on Watch: