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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: JUN 27 1996

June 20, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Sutina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1996-23

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 27, 1996.

Attachment

1 1 9 0 0 1 2 4 0 0 3

DRAFT

1 ADVISORY OPINION 1996-23

2
3 Jan Witold Baran
4 Wiley, Rein & Fielding
5 1776 K Street, N.W.
6 Washington, D.C. 20006

7
8 Dear Mr. Baran:

9
10 This responds to your letter dated May 17, 1996, requesting an advisory opinion
11 on behalf of ITT Corporation and its separate segregated fund concerning the application
12 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
13 regulations to the disaffiliation of political committees.

14 Your request presents the complex situation of a major corporate reorganization
15 involving three companies that each serve as the connected organization of a political
16 action committee. The status of these committees as affiliated or unaffiliated with each
17 other depends largely upon the relationship among the companies. The factual
18 background, legal analysis, and conclusions are discussed below.

19 You state that, on December 19, 1995, the former ITT Corporation, a Delaware
20 corporation ("Old ITT"), completed a corporate break-up which resulted in three
21 independent, publicly-traded companies. The three companies are (1) ITT Corporation,
22 which is also known as New ITT ("New ITT"), a Nevada corporation, (2) ITT Industries,
23 Inc. ("ITT Industries"), an Indiana corporation, and (3) ITT Hartford Group, Inc. ("ITT
24 Hartford"), a Delaware corporation.

25 The three companies specialize in "different, non-overlapping" business areas.
26 Specifically, New ITT focuses on the hospitality, gaming, entertainment businesses, and
27 information services businesses. It operates through six entities: ITT Sheraton
28 Corporation; CIGA S.p.A.; Caesar's World, Inc.; Madison Square Garden, L.P.; ITT
29 World Directories, Inc.; and ITT Educational Services, Inc. ITT Industries consists of
30 three manufacturing businesses: ITT Automotive; ITT Defense & Electronics; and ITT
31 Fluid Technology. Finally, ITT Hartford and its subsidiaries are insurance providers.

1 None of the three companies has an ownership interest in either of the other two
2 companies.¹ The breakup of Old ITT was accomplished through a stock distribution.
3 On December 19, 1995, Old ITT distributed all of its shares of common stock in two of
4 its wholly-owned subsidiaries, New ITT (formerly known as ITT Destinations) and ITT
5 Hartford, to the shareholders of old ITT. Upon the occurrence of this distribution, Old
6 ITT merged with a newly formed subsidiary ITT Indiana, to form ITT Industries which
7 was then reincorporated in Indiana. Approximately 56,000 shareholders of Old ITT thus
8 received three separate certificates, one representing a continuing ownership interest in
9 ITT Industries, and one for an ownership interest in each of New ITT and ITT Hartford.
10 Although there was common ownership of the three companies on the date of the
11 distribution, active public trading of these stocks has rapidly diversified the ownership of
12 these shares. During the three month period after the breakup, up until March 29, 1996,
13 42.6 percent of ITT Industries stock, 34.2 percent of New ITT stock, and 44.8 percent of
14 ITT Hartford stock were publicly traded.²

15 There are no overlapping officers among the three companies. You also assert
16 that "there is no joint management, control or operation of the three companies." There
17 are, however, a number of overlaps among the members of the companies' Boards of
18 Directors. Presently, the Board of ITT Industries has seven members while the Boards of
19 the other two companies each have 11 members. Two persons sit on all three Boards.
20 One of these is Rand Araskog, the former Chairman, President, and CEO of the former
21 ITT Corporation, and presently the Chairman and CEO of New ITT. The other person is
22 Robert A. Burnett who presently holds no officer position. There are other overlaps. The
23 Boards of New ITT and ITT Hartford share two other members, and New ITT and ITT
24 Industries share one other member. As a result of these overlaps, the eleven-person
25 Board of New ITT shares four members with the eleven-person Board of ITT Hartford
26 and three members with the seven-person Board of ITT Industries. The Board of ITT

¹ You note that, although New ITT owns no percentage of either of the other companies, its employees who participate in the New ITT 401(k) plan have funds invested in the other companies' common stock.

² The actual amounts were 50,145,000 shares out of 117.7 million shares of ITT Industries; 40,504,200 shares out of 118.4 million shares of New ITT, and 52,411,700 shares out of 117.1 million shares of ITT Hartford

1 Industries shares two members with the ITT Hartford Board. Of the 22 individuals who
2 hold the 29 seats on the present Boards, five hold overlapping memberships.

3 The list of old and new Boards sent by you indicates that there is also some
4 continuity between the Boards of Old ITT (11 members) and the pre-distribution ITT
5 Hartford Board (14 members), on the one hand, and the new Boards of the three
6 companies.³ Of the five present overlapping members, all were on the Old ITT Board
7 and all but one served on the Hartford Board. The Proxy Statement of August 31, 1995,
8 sent by you, which discusses the impending breakup, indicates that the four overlapping
9 members who served on the old Hartford Board (and who still do) were placed there after
10 August 31. Of the seven present members of the ITT Industries Board, six were members
11 of the old Boards: five were members of the Old ITT Board and three were members of
12 the Hartford Board. Of the 11 present members of the New ITT Board, nine were
13 members of the old Boards: eight were members of the Old ITT Board, and five were
14 members of the Hartford Board. Of the 11 present members of the ITT Hartford Board,
15 ten were members of the old Boards: nine were members of the pre-distribution Hartford
16 Board and four were members of the Old ITT Board.⁴

17 The Proxy Statement indicates that all of the executive officers of the three
18 companies were officers of Old ITT or its subsidiaries prior to the distribution. If, prior
19 to the distribution, an executive officer was with a subsidiary in a particular sector
20 associated with the three present companies, e.g., manufacturing,
21 entertainment/hospitality, or insurance, the officers, with one exception, remained with
22 the corresponding sector.

23 Prior to the distribution, the first post-distribution Boards of both New ITT and
24 ITT Hartford were elected by Old ITT as the sole shareholder. The entire New ITT

³ In attachments to your request, you list the Boards of Old ITT and the pre-distribution Board of ITT Hartford. You do not, however, list the Board members of ITT Destinations, Inc. which was the name of New ITT before the distribution. It appears from your submission that you consider the Old ITT Board to be the predecessor of the New ITT Board.

⁴ You note that two members of the New ITT Board who were not members of the Old ITT Board, Robert Bowman and Vin Weber, were (and currently are) members of the Board of ITT Educational Services, now a subsidiary of New ITT. The Proxy Statement indicates that all six of the present Board members of ITT Industries or New ITT that you list as serving on the Old Hartford Board (the four present overlaps plus two others no longer on the Hartford Board) were placed there after August 1995.

1 Board, however, was reelected by the shareholders on May 14, 1996, at their annual
2 meeting. The entire ITT Industries Board was reelected by the shareholders at their
3 annual meeting on May 21, 1996. In addition, on May 16, 1996, at the annual
4 shareholders meeting of ITT Hartford, the shareholders reelected the 10-member (at the
5 time) Board and elected an additional member.

6 You assert that there are no provisions in the Certificates of Incorporation, the
7 Bylaws, or the Proxy Statement that permit the former parent to retain control over the
8 Boards of New ITT or ITT Hartford. The Commission notes that the Proxy Statements
9 indicate that there are provisions of each companies' governing documents preventing
10 unsolicited takeovers through the granting of certain preventive powers to the Board of
11 Directors and restrictions on shareholder powers.

12 You note that, since the breakup, the three corporations have operated as separate
13 entities and operate in separate business sectors. The Proxy Statement discusses
14 agreements entered into by the three companies governing their relationship after the
15 distribution. These include a Distribution Agreement which would govern the
16 distribution of financial responsibilities and liabilities in accordance with the different
17 business sectors in which the companies are engaged and the allocation of debt. The
18 Distribution Agreement also provides that none of the three companies will take any
19 action that would jeopardize the intended tax consequences of the distribution, but none
20 of the companies anticipate that this limitation will inhibit its financing or other activities
21 or its ability to respond to unanticipated developments. There are other agreements
22 allocating tax liabilities, pertaining to intellectual property rights, including the licensing
23 and use of the "ITT" name, and pertaining to employee benefit and retirement plans. The
24 Proxy Statement states that these agreements are comparable to those that would have
25 been reached by unaffiliated parties in arms-length negotiations.

26 You state that the separate segregated funds of the three corporations operate as
27 separate entities. Prior to the breakup, three PACs existed. Old ITT's PAC was the ITT
28 Corporate Citizenship Committee. That committee is now the PAC of ITT Industries
29 and is now called ITT Industries Corporate Citizenship Committee. Second, Caesars
30 World, Inc., which is now one of the six businesses of New ITT, previously sponsored a

1 PAC. Immediately after the breakup, the Caesars World PAC was designated as New
2 ITT's SSF and is now known as the ITT Corporation Political Action Council. Finally,
3 both before and after the breakup, ITT Hartford supported its own PAC, the ITT Hartford
4 Advocates Fund, which solicited only ITT Hartford employees.

5 Since the breakup, there have been no transfers of funds among the PACs and no
6 PAC has contributed to the other. Prior to the breakup, the resources of Old ITT's PAC
7 were divided between itself and the Caesars World PAC so that, after the breakup, the
8 PACs of ITT Industries and New ITT would reflect the approximate funds attributable to
9 the employees that would be associated with each post-breakup company. ITT Hartford's
10 PAC was not included in this distribution because its funds consisted only of the
11 contributions of ITT Hartford employees and Old ITT's PAC had not solicited ITT
12 Hartford's employees. You state, at the time of the breakup, "each PAC was in a position
13 to and did move forward, as an unaffiliated entity, carrying the funds associated with its
14 respective employees." You note that, within ten days of the breakup, the new ITT PAC
15 amended its Statement of Organization to reflect the change in relationship among the
16 companies and the PACs.

17 You ask whether the New ITT PAC is presently disaffiliated from the ITT
18 Industries Corporate Citizenship Committee and the ITT Hartford Advocates Fund.

19 The Act and Commission regulations provide that committees, including separate
20 segregated funds, that are established, financed, maintained or controlled by the same
21 corporation, person, or group of persons, including any parent, subsidiary, branch,
22 division, department, or local unit thereof, are affiliated. Contributions made to or by
23 such committees shall be considered to have been made to or by a single committee. 2
24 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2), 110.3(a)(1), and 110.3(a)(1)(ii). In addition, a
25 corporation may make partisan communications to and solicit the restricted class (i.e.,
26 executive and administrative personnel and stockholders, and the families thereof) of its
27 subsidiaries for contributions to the corporation's separate segregated fund. 2 U.S.C.
28 §441b(b)(2)(A) and (4)(A)(i), 11 CFR 114.3(a)(1) and 114.5(g)(1).

29 Where an entity is not an acknowledged subsidiary of another entity, as in 11 CFR
30 110.3(a)(2)(i), Commission regulations provide for an examination of various factors in

1 the context of an overall relationship to determine whether one company is an affiliate of
2 another and, hence, whether their respective SFFs are affiliated with each other. 11 CFR
3 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J). The relevant factors in
4 the situation you have presented are as follows: (A) the ownership by one sponsoring
5 organization of a controlling interest in the voting stock or securities of another
6 sponsoring organization; (B) the authority or ability of one sponsoring organization to
7 participate in the governance of another sponsoring organization through provisions of
8 constitutions, by-laws, contracts or other rules, or through formal or informal practices or
9 procedures; (C) the authority or ability to hire, demote or otherwise control the
10 decisionmakers of another sponsoring organization; (E) common or overlapping officers
11 or employees, indicating a formal or ongoing relationship between the sponsoring
12 organizations; (F) members, officers, or employees of one sponsoring organization who
13 were members, officers, or employees of another organization which indicates a formal or
14 ongoing relationship or the creation of a successor entity; and (I) an active or significant
15 role by one sponsoring organization in the formation of another. 11 CFR
16 110.3(a)(3)(ii)(A), (B), (C), (E), (F), and (I). In addition, most of the factors set out at 11
17 CFR 110.3(a)(3)(ii) are applicable to the relationship between committees. The relevant
18 factors here are: (G) whether a committee provides funds or goods in a significant
19 amount or on an ongoing basis to another committee, such as through direct or indirect
20 payments for administrative, fundraising, or other costs; and (H) whether a committee
21 causes or arranges for funds in a significant amount or on an ongoing basis to be provided
22 to another committee. 11 CFR 110.3(a)(3)(ii)(G) and (H). The list of ten circumstantial
23 factors set out at 11 CFR 110.3(a)(3)(ii) is not an exclusive list, and other factors may be
24 considered. See Advisory Opinion 1995-36.

25 In analyzing the significance of these factors when presented with a request for
26 the disaffiliation of companies, the Commission does not have a formula whereby the
27 presence of a specific number of factors is sufficient or insufficient for continued
28 affiliation. In proposed disaffiliation situations, the historic background of the
29 relationships provides a context for assessing these factors. See Advisory Opinions 1995-
30 36 and 1994-9.

1 In Advisory Opinion 1994-9, for example, where a former joint venture company
2 sought to be disaffiliated from the former joint venturer companies that still retained a
3 reduced ownership interest, the Commission concluded that disaffiliation would be
4 premature. It based its conclusion on the continuing presence of a CEO from one
5 company and a managing director from the other company on a small Board; the fact that
6 these two persons were two of the three persons electing the new Board; the fact that
7 former officers of one of the venturers were among the executive officers; and the fact
8 that the joint venturers formed the predecessor company. In response to a subsequent
9 request to disaffiliate the company from one of the joint venturers, the Commission
10 concluded that disaffiliation had occurred. Although the former parent still had a Board
11 overlap with the requester, the former parent had sold its ownership interest, the Board
12 had expanded in size, there was an intervening shareholder election of the Board, time
13 had passed since the formation of the new company with the owner's reduced interest,
14 and the companies had operated separately for a period of time, including some direct
15 competition with each other. Advisory Opinion 1995-36.

16 Prior to the promulgation of the ten factors cited above, the Commission
17 considered two proposals for the disaffiliation of spin-off companies, using factors
18 similar to the ones discussed above. Advisory Opinions 1987-21 and 1986-42.
19 Significant factors in those opinions included the election of the Boards by the former
20 parents and the Board overlaps. In Advisory Opinion 1986-42, seven of the former
21 parent's 14 Board members also sat on the spun-off company's 12-member Board. In
22 Advisory Opinion 1987-21, four of the former parent's 12-member Board were serving
23 on the spun-off company's nine-member Board. Among other factors, both opinions also
24 noted the common shareholder base immediately after the spin-off and the fact that the
25 subsidiary's by-laws made it very difficult to wrest control of the company from the
26 previously elected Board. See also Advisory Opinion 1993-23 (where the Commission
27 addressed a spin-off and noted that, although there would be common identity of the
28 shareholders immediately after the distribution date, there would be vigorous public
29 trading of the stocks as a result of an initial public offering).

1 With respect to the proposed disaffiliation of the ITT companies, the Commission
2 notes that none of the companies owns any stock in either of the other companies. 11
3 CFR 110.3(a)(3)(ii)(A). As a related matter, the common shareholder base of the
4 companies appears to be reducing rapidly. Although shareholders of each company were
5 the same right after the distribution, there has been vigorous public trading of stock in all
6 three companies since then. The Commission further assumes that no single group of
7 shareholders from one company will own a controlling interest of the stock of one of the
8 other companies. (See footnote 1.) See Advisory Opinions 1994-9 and 1993-23. See
9 also Advisory Opinion 1989-17.

10 As stated above, you assert that there is no joint management, control, or
11 operation of the three companies. You also assert that neither ITT Industries nor ITT
12 Hartford may participate in the governance of New ITT through provisions of governing
13 documents, contracts, other rules, or practices, nor do those companies have the right to
14 hire, demote or otherwise control the decisionmakers of New ITT. You also state that
15 New ITT does not have this kind of authority over ITT Industries or ITT Hartford. See
16 11 CFR 110.3(a)(3)(ii)(B) and (C). In connection with this, there are contractual
17 agreements among the three companies governing the relationships after the distribution.
18 Although the Commission does not have materials to fully determine the effect of these
19 agreements, they appear, from the description in the Proxy Statement, to be aimed at
20 sorting out liabilities and obligations that exist as an outgrowth of their previous
21 relationship, and do not appear to be aimed at continuing one company's control over
22 another. See Advisory Opinions 1994-9 and 1993-23.

23 It appears that the factors related to the PACs themselves are not present. Prior to
24 the breakup, there were transfers of funds to prepare for the post-distribution separation
25 of operations. Since the breakup, it appears that there have been no transfers or
26 contributions between the PACs, and there is no indication that one PAC will solicit
27 contributions to be made to another PAC. See 11 CFR 110.3(a)(3)(ii)(G) and (H).

28 There are, however, overlaps among the Boards. The overlap between ITT
29 Industries and New ITT is more substantial than those between ITT Hartford and each of
30 the other two companies. ITT Industries has a small board consisting of seven persons

1 but three of those persons are from the New ITT Board. This compares with the sharing
2 of four persons by the eleven person Boards of ITT Hartford and New ITT and the
3 sharing of only two persons (those who sit on all three Boards) between ITT Hartford
4 and ITT Industries. See 11 CFR 110.3(a)(3)(ii)(E).

5 There also appears to be substantial continuity between the Board of Old ITT,
6 which survives presently as ITT Industries, and the Boards of both ITT Industries and
7 New ITT. Although the Board of ITT Industries, as the surviving, albeit reincorporated,
8 former parent may be expected to be composed largely of pre-distribution Board
9 members, it is notable that New ITT's Board consists so substantially of the former Board
10 members of ITT Industries (i.e., Old ITT). The Board of ITT Hartford also reflects
11 continuity with its own previous Board which consisted, in part, of four Old ITT (and
12 present overlapping) directors, but reflects less of a presence of the Old ITT members
13 than does the Boards of the other two companies. See 11 CFR 110.3(a)(3)(ii)(F).

14 With respect to the active or significant role of one sponsoring entity in the
15 creation of another, it may be posited that these three entities were newly constituted out
16 of the events related to the distribution and that none of the entities formed each other. In
17 addition, all three entities existed in some form prior to the distribution. However, as
18 indicated above, Old ITT still survives as ITT Industries, and thus ITT Industries was
19 responsible for the formation of the other two companies as publicly-held entities. See 11
20 CFR 110.3(a)(3)(ii)(D).

21 The Commission considers the three previous factors, those relating to overlaps
22 and continuity, to be very significant in reaching its conclusion. It is expected that
23 companies that are spun off from another company would include, on their Boards, some
24 persons who were members of the older company's Board. Standing by itself, such a
25 succession may not be particularly significant. However, when this is coupled with the
26 fact that these Boards retain old Board members who have stayed on as overlapping
27 members, i.e., members who will not be associated just with the company of one business
28 sector, then an ongoing relationship between the companies is clearly indicated. The
29 overlap and continuity may have additional significance in view of the fact that, pursuant
30 to agreements, the companies will have a continuing relationship.

1 There is, however, a significant countervailing consideration directly related to
2 these factors. Each company has held a shareholder election of the Boards in May 1996.
3 Thus, not only were the Boards of New ITT and ITT Hartford, (originally chosen by Old
4 ITT) now selected by the companies' new shareholders, but the Boards of the three
5 companies were reelected at a time when there had been substantial divergence from the
6 original common ownership of the companies. See Advisory Opinion 1993-23.

7 In view of the background and continuing relationship of the companies, the
8 presence of three New ITT Board members, including the New ITT Chairman, on the
9 seven-member ITT Industries Board still leads to a conclusion that disaffiliation between
10 ITT Industries and New ITT would be premature. Although New ITT and ITT Industries
11 have each had an intervening shareholder election, the overlap of almost 50 percent on
12 ITT Industries' small Board precludes disaffiliation at present.

13 The Commission does not reach the same conclusion, however, with respect to
14 the relationship of ITT Hartford with the other two companies. The Commission
15 acknowledges that some Old ITT Board members were placed on the Old Hartford Board
16 in anticipation of the breakup, and that there is still some overlap, including the presence
17 of the New ITT Chairman on the Hartford Board. Nevertheless, the overlap between ITT
18 Hartford and each of the other two companies is less than the overlap between the latter
19 two. On the 11-person Hartford Board, there are nine members who do not overlap with
20 ITT Industries and seven who do not overlap with New ITT. In addition, in the recent
21 shareholder election, the Board was enlarged by one position from its original post-
22 distribution size, and the individual elected to fill that position is not a director of either
23 of the other companies. Moreover, the ITT Hartford Board is less reflective of the Old
24 ITT Board than is the Board of New ITT.

25 The Commission advises you that, within ten days of your receipt of this opinion,
26 New ITT's PAC and the ITT Industries PAC should amend their statements of
27 organization to reflect their affiliation with each other. 2 U.S.C. §433(b)(2); 11 CFR
28 102.2(b).

