MEMORANDUM

To: Dr. Arturo Morales Carrión

From: Juan M. García

Re: Policy comments on developments regarding the Commonwealth status that may arise from the inclusion of the Commonwealth in a German U. S. taxation treaty and a similar one with Canada.

A. The facts of the case—in brief—are:

1. German fiscal authorities have insisted in including the ELA in a treaty to be negotiated between the United States and Germany, due to the special taxation conditions in Puerto Rico emanating from the P. R. Industrial Incentives Act of 1954 (in letter of July 3, 1957).

2. They insist also, that all initiative will have to emanate from Washington; e.g., the Treasury Department (in letter of July 12, 1957).

3. They have proposed (in letter of July 12, 1957) to include the ELA-German tax questions in the agenda of a planned meeting to be celebrated in Washington.

4. Mr. Teodoro Moscoso believes it is not feasible, within our present constitutional status, to negotiate a
separate taxation treaty (in letter from TM to JFB, July 19, 1957).

5. Mr. Moscoso believes that the inclusion of the ELA in the treaty would be very advantageous to our industrial expansion program (in already cited letter).

6. The U. S. Treasury Department has agreed on the inclusion of the ELA and promised its support (memo from LHB to MHR of September 22, 1958).

7. Canada has proposed similar measures in another treaty. (In cited memo).

We will avoid here a discussion of the economic aspects of the problem, accepting the judgment of Mr. Moscoso that the inclusion of ELA in the treaties would be economically advantageous.

We will discuss only the implications and projections that the aforesaid inclusion might have on our present political status.

B. Analysis of facts: (1) Even if the ELA would not be expressly included in the treaty, it would be binding for us, since treaties are in U. S. Constitutional theory "the supreme law of the land" and this provision remains still as
part of our contractual obligations in the compact (U. S. Const., art. 6, sec. 2). Nevertheless, the consideration of the treaty by Congress might be posterior to the approval of House Bill 6009 now in public hearings stage here in P. R. The aforesaid bill states that "treaties might or might not apply according to their own dispositions." ("El Mundo," November 14, 1958, pp. 1, 35). After the passing of such a bill it is evident that the express mention of the Common-wealth in all treaties would be necessary.

(2) The specific inclusion of the ELA in the treaty at this stage (before the passing of the aforementioned bill) must serve a definite purpose; i.e., a set of special provisions regarding our specific economic and fiscal policies. This would be the only logical reason for such an specific mention in the light of comment (1).

(3) If the case is the one in the preceding comment (2), it would not constitute any problem at all, since special provisions have been made before for states and territories in treaties suscribed by the U. S.; e.g., by exclusion: in the U. S.-Pakistan taxation treaty, where Puerto Rico is not mentioend as a part of the U. S. where the treaty would apply ("Convention Between ... etc.," art. II, sec. (a); in our archives).
4. Nevertheless, the opportunity could be profited from in other respects: e.g., including some provision regarding or implying a mention of our particular status. The inclusion and specific mention of the Commonwealth in the treaty would constitute a tacit recognition of our associated status only if the special provisions are not exclusively economic. The opportunity can be, and should be used to establish a precedent in the treaty-making system of the U. S. concordant with Dr. Fernós' proposed bill. Two patterns are already functioning in the treaty under discussion: (a) expressed desire of the foreign country after un-official consultation to include Puerto Rico in the treaty; (b) answer by the Government of the U. S. after consultation with our Departments accepting or rejecting participation of the ELA.

C. Specific recommendations: In the light of the preceding discussion, a clause following the pattern set below could be included in the treaty:

"The Commonwealth of Puerto Rico may legislate or take the necessary or proper measures for performing the obligations to which it has expressed its consent in this treaty."

(1) The clause, as recommended here, would constitute a definite step forward in regard to our international relations
as a Commonwealth. It would have the following favorable implications:

(a) Being "the supreme law of the land" provisions of a treaty have not been usually subject to legislative or judicial revisions in the U. S. The usual pattern followed by the Supreme Court is to declare constitutionally valid the foreign obligations of the U. S. and in any case, "an apparent conflict of this character would be resolved by interpretation." (Wright, 13 Am. Jour. of Int. Law, pp. 261 ff.).

(b) By giving the ELA the power to "take the necessary or proper measures to perform obligations" it would tacitly permit the ELA to enter into direct negotiations with the two countries (after congressional ratification of the treaty) regarding the economic problems concerned within the treaty.

(c) The development in (b) could lead, as it did in the case of Canada, to the eventual concertation, directly between the ELA and foreign countries of draft treaties that would then be submitted to Presidential and Congressional ratification.

(d) The part of "consent" in the proposed clause could serve as a precedent so as to make it a necessary procedure in all treaties conducted by the U. S. which might have specific relation to Puerto Rico.
(2) The clause and its inclusion could present the following problems:

(a) Difficulties of conservative approaches to our Commonwealth relations. - Since it is probable that the foreign country's governments would not oppose such a measure, being outside their realm of interest, the possible difficulties might be present in ratification of the treaty by Congress. In this case it is possible to assume Congress would not imperil the treaty as a whole by giving too much importance to the clause, which might be inoffensively included within the solely economic ones and whose actual importance might not be realized by them. This seems to indicate the main efforts as to the inclusion of the clause should be directed towards the agency in charge of drafting the treaty; e.g. the Treasury Department. A good case could be prepared for them as to the advantages of the inclusion of such a clause.