provisions these references do not appear; however, in a guide to the EEC provisions issued by the Commission in 1980, it is stated that "Community interest may cover a wide range of factors but the most important are the interests of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market."[11] Clearly, these references to competition policy concerns are minimal; however there are a number of cases in which experts in Brussels asert that such concerns have been important or decisive.[12]

It will be difficult to draft language to bring about the proposed changes in emphasis unless clearly there is a manifest political will to bring about a change in emphasis. Consideration of Section 337 of the U.S. Tariff Act administered by the USITC suggests what the problems will be. Section 337 specifies that relief is available in regard to "unfair methods of competition and unfair acts in the importation . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated. . ." (emphasis added). If some such provision were incorporated in the contingency protection provisions, we might envisage that an inefficient industry (that is, one which is unable to compete with imports primarily because it is inefficient) or a monopoly or oligopoly should not get relief. This would, one might hope, mitigate the present excesses of the injury standard, which Dale has rightly described as a simple "diversion of business standard". If so this would be a major, highly controversial change in U.S. legislation; nothing in the U.S. legislative history of the Article VI provisions suggests that such a change could be comtemplated in the present highly protectionist mood of the Congress. It is clear too that, as a practical matter, it is only if the U.S. is prepared to make such a change, and to give the necessary leadership, that there is any possibility of such a radical change being made in the thrust of the system.

Section 337 of the U.S. Tariff Act speaks of two alternatives: imports which injure an efficient industry or imports which "restrain or monopolize trade and commerce in the United States". On the surface this second alternative looks like a formulation directed at predation, or at the effects of behaviour which resembles predation, whatever may be the intent of the exporter. This separate or alternative test provides useful language; clearly, from a competition policy point of view there is a major difference between dumped or subsidized or increased imports which destroy competition and those which do not. But the two phrases we have cited are governed by the operational phrase "effect or tendency". Section 337 deals with acts which have a "tendency to substantially injure" or "to restrain trade. . .". "Tendency" is a weak word, and the evolution of this section has been influenced by the fact that is, in practice, largely but not solely, directed to alleged patent infringement by importations. That being the case, the standards of domestic patent infringement law are imported into 337; for example, in one case the commission noted that "A domestic company infringing a patent cannot defend by saying that the patent owner is economically strong, so that infringement of the patent should be over looked".[13] Moreover, the concept of "substantial injury" does not involve a high threshold of pain or of evidence. "The question or degree of harm to be proved by a preponderance of the evidence in order to substantiate a reason to believe that the imported infringing luggage containers constitutes the effect or tendency to destroy or substantially injure the domestic industry can hardly be defined with precision. The requisite harm is clearly more than de minimis... It