

technical sense the documents are different in almost every respect. In the Commission's report on Senate Concurrent Resolution 38, however, we attempted to identify those differences which seemed most important, and which might call for a different result depending upon whether the Act or the Code were applied. The Commission report notes a number of such instances. I will highlight only a few of them here.

A. *The injury test*

THE ACT

The Act requires that the Commission shall determine "whether an industry in the United States is being, or is likely to be, injured . . . by reason of the importation of such merchandise . . .".

THE CODE

The Code states that before dumping duties can be imposed it must be found that the dumped merchandise is "demonstrably the principal cause of material injury or threat of material injury to a domestic industry," (Article 3) and that the authorities must "weigh, on the one hand, the effect of the dumping and, on the other hand, all the other factors taken together which may be adversely affecting the industry."

One difference here appears to be that the Code requires a weighing procedure while the Act does not, requiring the Commission to evaluate all factors adversely affecting the industry and determine whether other factors were more responsible for the injury to the industry than are the sales at less than fair value. Under the Act it is merely necessary to focus on one factor, dumped imports, and determine whether an industry is being injured by them.

The Code requires that in evaluating the effect of the dumped imports on the industry the Commission must consider all factors having a bearing on the state of the industry, and such as "development and prospects with regard to turnover, market share, profits, prices . . . export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry, and productivity; and restrictive trade practices." (Article 3) This appears to say that if the industry is otherwise healthy, then an injury finding cannot be made. The Commission majority noted, however, that—

"The Act does not authorize the forgiveness of a material injury caused by less than fair value imports in those cases where consideration of 'all [other] factors having a bearing on the state of the industry in question' shows that the industry is in a healthy condition despite the effect of the less than fair value imports."

Moreover, if I may add a personal view which does not appear in the majority report, if the language of the Code relating to restrictive trade practices means that under it a dumping charge can be defended on the ground that the domestic industry is engaging in restrictive trade practices, then it is clearly different from the Act, which provides no such defense.

B. *The industry test*

THE ACT

The Act states that dumping duties must be applied if "an industry in the United States is being or is likely to be injured . . . "by dumped merchandise.

THE CODE

The Code defines the domestic industry as producers of like products (Article 4(a)) and defines like products as those which are identical or have characteristics closely resembling those of the dumped product (Article 2(b)).

Differences

First, the Act permits the Commission to find injury to an industry other than that producing a like article. The Code would not. For example, if apples were being dumped and were being processed into applesauce, the Act would permit the application of dumping duties if the domestic applesauce producers were being injured. The Code apparently would permit the production of dumping duties only if there were injury to the apple producers, but not if there were injury to applesauce producers.