The Protectionist Politics of Globalized Regulatory Enforcement: Evidence from Cartel Prosecutions Involving Foreign Firms

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Abstract

Economic globalization has created new opportunities for economic patriotism, or the promotion of local prerogatives in integrated markets. However, few scholars have investigated whether regulatory enforcement is systematically used as a tool of economic protectionism. In this article, I empirically investigate whether foreign firms face stiffer sanctions than domestic firms when they commit similar regulatory violations. Using a database of 5,000 cartel sanctions from 1990-2019, I develop novel fine severity measures that account for differences in the size and gravity of cartel activity. Multi-level regression models show that foreign firms receive fines that are 100-150% more severe than similarly situated domestic firms. Judicial review, independent competition agencies, and transnational regulatory networks do not moderate these tendencies. The analysis suggests that globalized regulatory enforcement is used to disadvantage territorial outsiders and that foreign discrimination occurs even in highly technocratic and internationalized areas of regulation.

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1. Introduction

When regulators sanction a company domiciled in a foreign jurisdiction, they are widely perceived as engaging in politically motivated enforcement. Consider the following example. In June 2014, BNP Paribas plead guilty to illegally processing financial transactions in Sudan, Cuba, and Iran, in violation of U.S. terrorist financing laws. As part of the plea deal, the bank, which is France's largest, agreed to pay $8.9 billion to the Department of the U.S. Treasury. In response, French President Francois Hollande wrote a letter to US President Barack Obama calling the sanction "unfair and disproportionate."[2] While the company might deserve some sort of sanction, he argued, the large size of the penalty—which was five times bigger than any previous sanction for a similar infraction—unfairly discriminated against French companies.

Although the US government had a strong rationale for prosecuting BNP Paribas, which had flouted terrorist financing laws for years, Hollande's concern was not without reason. Contemporary market regulation may now be mediated by independent regulatory institutions, global epistemic communities, and technocratic discourse that each, in their own way, militate against the protectionist policies of previous eras. However, market regulators maintain significant discretion over how the law is applied in individual cases. In the context of *globalized regulatory enforcement*, or regulatory enforcement actions involving foreign firms,[3] enforcement discretion creates an opportunity to pursue what Clift and Woll (2012) term "economic patriotism," or the defence of territorially defined economic interests within

[2] See "BNP Paribas stirs tensions between France and US," *Financial Times,* June 5, 2014. Accessible at https://www.ft.com/content/0acc10ce-eca0-11e3-8963-00144feabdc0. See also "Hollande Backs BNP Paribas in Letter to Obama," *Wall Street Journal,* June 4, 2014. Accessible at < https://www.wsj.com/articles/hollande-backs-bnp-paribas-in-letter-to-obama-1401885257?ns=prod/accounts-wsj>.

[3] By foreign firm, I mean a firm that is domiciled (or headquartered) outside of the regulatory jurisdiction doing the enforcing. In most cases, globalized regulatory enforcement relates to a foreign firm's activity in the regulator's home territory. However, it can also include extraterritorial enforcement, or enforcement actions related to activity that occurs outside of the regulator's political jurisdiction.

integrated markets (38). Regulators, for instance, can focus their investigative resources disproportionately on foreign companies. They can assess higher sanctions on these companies in response to regulatory violations while showing comparative forbearance to domestic firms that violate similar laws. And they can do all of this while staying within the formal bounds of international agreements, the rule of law, and their delegated authority.

Certainly, there is no shortage of major enforcement actions that have the imprimatur of economic patriotism. Many of the most sweeping and expensive corporate prosecutions in recent years, from the European Commission's competition judgments against Google and Apple (Kokkoris, 2017) to the US Department of Justice's crusade against foreign tax havens (Verdier, 2020), have involved firms domiciled in foreign jurisdictions. But while economic patriotism may be commonly perceived in such cases, it is more difficult to demonstrate empirically. A regulatory agency could focus its investigations disproportionately on foreign corporations because of economic patriotism; or a focus on foreign companies could simply reflect the fact that foreign firms are less likely to comply with domestic rules. Disparities in penalty amounts might mean foreign firms are treated more severely; alternatively, the foreign firms prosecuted may simply commit more substantial regulatory violations.

In this article, I use a database of international cartel enforcement actions to provide new insight on the phenomenon of foreign corporate prosecutions. Examining more than 5,000 sanctions against international cartel activity since 1990, I find evidence that economic patriotism systematically shapes regulatory enforcement. Using cartel-level data on the size of affected commerce and the estimated consumer overcharge, I show that foreign domiciled firms consistently received more severe fines compared to domestic firms sanctioned for similar cartel activity. Through multi-level regression modeling, I show that this foreign differential is robust to country-, cartel- and industry-level controls. My model suggests that, as a percentage of cartel-affected commerce, foreign firms received average fines that were

116% higher than domestic firms. As a percentage of estimated consumer overcharge, the average sanction assessed on foreign companies is 153% higher than domestic companies.

I find no evidence that the tendency to assess more severe sanctions on foreign firms is moderated by institutions that ostensibly encourage more technocratic or cosmopolitan approaches to regulation. More independent regulatory institutions and extensive judicial review do not reduce the foreign differential in sanction severity. Membership in transnational regulatory networks is associated with a higher foreign differential. Although technocratic institutions may have other benefits, such as improving regulatory capacity, disseminating best practices or facilitating joint investigations, they do not appear to moderate discrimination against foreign firms in globalized regulatory enforcement.

The empirical findings contribute to several debates in regulatory governance and the political economy of regulation. The first contribution is to provide new insight on the role of corporate foreign prosecutions in regulatory enforcement. Studies in law consistently highlight a steady increase in the number of foreign firms sanctioned by regulators since the 1980's, especially in the United States (B. Garrett, 2014; B. L. Garrett, 2011; Verdier, 2020; Zarate, 2013). However, much less is known about the role of globalized regulatory enforcement in jurisdictions outside of the U.S.: how the frequency of such investigations has changed over time and how foreign and domestic firms are treated when they commit similar regulatory violations. In this article, I show that foreign corporate sanctions have become a regular component of regulatory enforcement across most jurisdictions in the OECD. By using fine severity measures and quantitative modeling techniques that partially account for differences in corporate behavior and circumstance, I provide strong evidence that foreign companies receive higher penalties because of differences in regulatory treatment, addressing a limitation of previous studies (B. L. Garrett, 2011).

The second contribution is to provide stronger evidence than previous studies that enforcement discretion is systematically used to favor domestic firms. An extensive body of research has documented how economic liberalization and re-regulation can be designed and implemented in ways that advantage nationally important firms (Block, 2008; Bulfone, 2020a, 2020b; Büthe & Mattli, 2013; Clift & Woll, 2012; Frieden, 1991; Gulotty, 2020; Levi-Faur, 1998; J. D. Levy & Levy, 2006; Mazzucato, 2013; Thatcher, 2014b; Volberding, 2020). Within this literature, a handful of studies have focused on how incomplete enforcement can be used as an adjunct to industrial policy (Dewey & Di Carlo, 2021).[4] However, no extant study considers whether economic patriotism shapes globalized regulatory enforcement, and whether it has intensified alongside globalization.

A final, related contribution is to assess whether the development of more internationalized, technocratic modes of regulation constrains or facilitates economic patriotism in regulatory enforcement. Previous studies have used case studies to show that the internationalization of public policy, by shifting the preferences and interests of domestic policymakers, can encourage the adoption of more liberal economic policies (Djelic & Sahlin-Andersson, 2006; Thatcher, 2007; Verdun, 1999). The literature on the regulatory state has also documented the many ways that independent regulatory agencies alter the regulatory policymaking process (Gilardi, 2002, 2005; Levi-Faur, 2005, 2011). However, none of these studies have specifically assessed whether these institutions temper economic nationalism in regulatory enforcement.

Together, these empirical contributions provide additional evidence that economic patriotism remains alive and well in the neoliberal era. Although the internationalization and legalization of regulation may have led to a decline in “market steering” interventions that

[4] The studies in law that do focus on foreign corporate prosecutions have been limited to the United States (B. Garrett, 2014; B. L. Garrett, 2011; Verdier, 2020; Zarate, 2013)

promote particular firms and sectors (J. D. Levy & Levy, 2006; Majone, 1997), states still have tools that can be used to promote the interests of national firms (Clift & Woll, 2012; Helleiner & Pickel, 2005; Levi-Faur, 1997). Chief among these is a state's discretionary authority over regulatory enforcement. While international agreements and rules make it more difficult for governments to use tariffs and subsidies to confer relative advantage to domestic interests, states can selectively enforce rules in ways that show relative favoritism to domestic firms and/or disfavoritism to foreign firms. The fact that patterns of discriminatory treatment can be found in the enforcement of competition law—a technocratic area of regulation that has, as one of its ostensible goals, the limitation of protectionism—suggests that economic patriotism is a pervasive phenomenon within regulatory enforcement, and possibly even more pronounced in other less technocratically organized areas of public policy.

The rest of the paper is structured as follows. The next section outlines the theoretical framework that is used to analyze the role of economic patriotism in regulatory enforcement and the institutions that may constrain it. A third section explains why international cartel enforcement is an appropriate policy area in which to examine protectionism in globalized regulatory enforcement. A fourth section presents the empirical analysis. A final section discusses some implications of these findings for the political economy of law enforcement and concludes.

2. Theoretical Framework

To understand the role of economic patriotism in globalized regulatory enforcement, I draw insights from three different literatures in political economy and regulatory governance. First, I introduce the literature on economic patriotism which explores how liberalization and reregulation can be used to advantage economic insiders. I then summarize how this

theoretical frame can be combined with recent work on the political economy of law enforcement to generate specific theoretical hypotheses about how economic patriotism might shape globalized regulatory enforcement and why this effect should be more pronounced with globalization. Finally, I examine why the development of more internationalized and technocratic modes of regulation could potentially moderate economic patriotism.

2.1 Economic Patriotism in the Neoliberal Era

I begin by considering the literature on economic nationalism that has been developed in studies of state economic policy in the neoliberal era (Block, 2008; Bulfone, 2020b; Clift & Woll, 2012; Mazzucato, 2013; Thatcher, 2014b). Building on work in classical political economy that emphasizes the role of the state in the development of capitalism (Gerschenkron, 1962; List, 1856; Polanyi, 1944; Shonfield, 1965), scholars contend that markets, in the present as in the past, remain state-mediated institutions that cannot be separated from the political communities that create them. Consequently, even in the current moment, when economic liberalization and regulatory reform have placed new constraints on the state's policy autonomy to direct economic and industrial development (Berger, 2000), states still face the need to "negotiate compromises between abstract economic objectives and territorially bound political obligations" (Clift & Woll, 2012, p. 308). One way they can do this is by using the process of economic liberalization itself, as well as the new regulatory policy instruments created to manage it, in ways that "discriminate in favour of particular social groups, firms or sectors understood by the decision-makers as insiders because of their territorial status (Ibid)." The contemporary political context means that instruments of economic patriotism are often more 'liberal,' (Bulfone, 2020a) 'supranational' (Rosamond, 2012), 'hidden' (Block, 2008), and 'indirect' (Thatcher, 2014b) than the conservative forms

of protectionism employed in previous eras. But nevertheless, state actors retain a variety of tools and policies that can be used to promote the interests of particular firms and sectors within increasingly open and integrated regional and global markets.

Governments, for instance, can support the creation of common regional or international regulatory standards in areas that benefit domestic firms while maintaining national standards where leading domestic firms have less of an advantage (Büthe & Mattli, 2013; Clift & Woll, 2012; Simmons, 2001; Story & Walter, 1997; Vogel, 2009). Similarly, policymakers can pursue selective market opening and privatization, liberalizing sectors that are well positioned to compete internationally while maintaining more protections in others (Bulfone, 2020a, 2020b; Thatcher, 2007, 2014b). Even as they abide by new rules limiting state aid and banning non-tariff barriers to trade and legal monopolies, states can use licensing, tariff setting, and direct and indirect public guarantees to confer aid to firms (Bulfone, 2020b; Rickard, 2018; Thatcher, 2014b). For instance, national development banks have been used to both prevent foreign takeovers and support the growth of particular firms and sectors (Mertens & Thiemann, 2018; Mertens, Thiemann, & Volberding, 2020). In some cases, even policy areas that have the explicit goal of limiting economic protectionism—such as competition law, free trade agreements, or non-discrimination rules— can be organized and applied in ways that support broader industrial policy goals (Sauter, 1997; Thatcher, 2014a).

2.2 Regulatory Enforcement and Economic Patriotism

Regulatory enforcement, with important exceptions (Dewey & Di Carlo, 2021), has not been a major focus of economic patriotism studies. However, there are strong reasons to think that enforcement, and in particular globalized regulatory enforcement, could be deployed in way that benefit territorially defined interests. As outlined in the introduction of

this special issue, in most areas of regulatory policy, state actors possess enforcement discretion, defined as independent decision-making within certain bounds (Thatcher & Sweet, 2002). This discretion stems from the fact that most laws require prosecutors or regulators to allocate limited investigative and enforcement resources between a range of legal mandates (Zacka, 2018). As important, they must determine how specific cases should be treated and resolved when they do find evidence of regulatory violations. One result is pervasive underenforcement, since governments can never fulfill the Weberian expectation that all violations of the law will be met with "physical or psychological coercion" applied by state officials (Weber 1978, 34). Another result is that public officials have significant discretionary power over how and when the law is applied. At times, this can include the ability to "block, alter, modify, falsify, distort, or eliminate actions prescribed by law" (Dewey, Woll, & Ronconi, 2021, p. 6).

In the context of globalized regulatory enforcement, there are strong theoretical reasons to expect that states would use this discretionary authority in ways that advantage domestic firms. Globalized regulatory enforcement offers governments a rare chance to intervene directly in the affairs of foreign corporations without running afoul of international agreements and liberal norms. In many areas of regulation, this includes companies within sectors such as information technology, energy, or raw materials which are strategically important to governments. Globalized regulatory enforcement also offers governments the opportunity to either selectively enforce rules against foreign companies or to show comparative leniency to domestically domiciled companies, many of which maintain strong ties to the political community (Doremus, Keller, Pauly, & Reich, 1999). As Dewey and Di Carlo (2021) argue, incomplete enforcement offers "a subtle mode of governance through which governments can shape the supply side of the economy" in a context where many of the traditional tools of industrial policy are no longer readily available (2).

Building on the political economy of law enforcement approach, I expect that regulators will pursue *selective enforcement*, where the state "target[s] certain social groups rather than others, according to extralegal criteria" (Dewey at al. 2021: 11). In particular, I expect regulators to use their discretion over regulatory fines, which are generally set according to complex criteria that are difficult for outsiders to discern or contest, in ways that systematically favor domestic compared to foreign domiciled firms. Here, I follow Dewey and DiCarlo in viewing selective enforcement as "functionally equivalent to [the] direct subsidies used as old instruments of industrial policy" (2)—a way for regulators to promote territorial interests in a context where traditional tools are no longer viable. Just as tariffs were once used to protect existing local industries or facilitate the emergence of new ones, regulators can use their regulatory enforcement discretion to systematically advantage the interests of territorial insiders and disadvantage territorial outsiders.

Hypothesis 1: All else equal, foreign companies will receive more severe penalties than domestic companies sanctioned for similar regulatory violations.

2.3 Institutional Constraints on Economic Patriotism

At the same time, I do not expect economic patriotism will be the only concern that motivates enforcement choices. As emphasized throughout this special issue, state actors often have multiple objectives and face a number of institutional constraints that affect how they pursue their goals. While regulators will sometimes face political pressure, both explicit and implicit, to exercise their discretion in ways that favor territorial insiders, they may also face countervailing pressures to not show favoritism. In some policy areas, regulators may conclude that discriminatory enforcement, because of its contravention of rule of law norms, or the risk of tit-for-tat retaliation, is not in the public interest. In other areas, regulators may

find, due to institutional constraints such as judicial review, that they are unable to effectively use enforcement discretion to advantage domestic firms or target foreign ones.

There are reasons to expect that that two related sets of institutional developments will limit either the motivation or the "relative power" of public officials to use their enforcement discretion to systematically favor domestic firms or discriminate against foreign ones (Dewey et al., 2021, p. 2). First, there is the possibility that the internationalization of public policy through transnational regulatory networks may moderate economic patriotism by leading regulators to develop a more cosmopolitan understanding of state interests and a greater commitment to technocratic approaches to enforcement. Second, there are reasons to expect that the organization of regulatory policy through technocratic institutions at the domestic level, such as the establishment of independent regulatory agencies, or the expansion of the role of courts in regulatory processes, will make it more difficult to show favoritism to domestic firms.

2.3.1 Transnational Epistemic Communities and Regulatory Networks

Over the last few decades, public policy communities have become increasingly organized on the transnational and global levels. Well-defined "epistemic communities," or transnational networks of knowledge-based experts who share common sets of normative and causal beliefs about a particular set of policy problems, have been established within many policy areas (Djelic & Sahlin-Andersson, 2006; Haas, 1992). These epistemic communities have often developed through and alongside transnational regulatory networks of government agencies that use a combination of information sharing, standard setting and ongoing coordination to encourage the development of common approaches to public policy challenges (Levi-Faur, 2005, 2011; Slaughter, 2001, 2002; Verdier, 2009). Although the effectiveness and accountability of these communities and networks is debated (Slaughter &

Zaring, 2006; Verdier, 2009), there is general agreement that these developments have altered the politics of public policymaking by creating a new wedge between agencies and their political principals (Thatcher, 2007).

As Haas (1992) has emphasized, transnational epistemic communities and networks can sometimes lead domestic policymakers to redefine the "self-interests of a state or a faction within it" (15). One important aspect of this redefinition is a shift from parochial to more cosmopolitan understandings of the state's interests. This is not only because the interconnected and transnational nature of many policy problems are more clearly seen within international fora, but also because transnational epistemic communities encourage the development of "outward policy outcomes that benefit society beyond the nation" (Cross, 2013, p. 157). Close observers of the International Competition Network, for instance, have noted that the ongoing interaction, cooperation, and information sharing facilitated by institutionalized exchange encourages regulators to "focus on shared agendas instead of more narrowly defined national interests" (Hollman & Kovacic, 2011, p. 286).

In the context of globalized regulatory enforcement, the internationalization of regulatory policymaking should temper economic patriotism. Membership in transnational regulatory networks should lead regulators to conceive of their mission in cosmopolitan rather than parochial terms. It should also encourage the adoption of technocratic modes of regulatory enforcement that discourage political criteria from shaping outcomes. Both of these influences, in turn, should lead regulators, in their enforcement of regulatory rules, to be less likely to differentiate between foreign and domestic firms.

Hypothesis 2a: *All else equal, in jurisdictions where regulators are members of transnational epistemic communities and networks, foreign firms will receive monetary penalties that are more similar to the penalties assessed on domestic firms.*

2.3.2 Independent Regulatory Agencies

Even when regulators remain interested in using their enforcement discretion to advantage territorially defined interests, they may not always have the means. Scholars studying the rise of the 'regulatory state' have noted how shifts in the organization of regulatory institutions since the 1980's has led to more formalized and technocratic policymaking processes (Majone, 1997; Thatcher, 2002; Thatcher & Sweet, 2002). By establishing new barriers to political interference in enforcement decisions, independent regulatory agencies have led regulatory decision making to become more professionalized, formalized and transparent (Gilardi, 2005; Gilardi, Jordana, & Levi-Faur, 2006; Thatcher, 2002). Although intervention always remains possible, there is evidence that, in many contexts, independent regulatory agencies operate at arm's length from political principals (Thatcher, 2002). By establishing new barriers to political interference in enforcement decisions, independent regulatory agencies may therefore reduce the channels through which mercantilist concerns shape globalized regulatory enforcement.

Hypothesis 2b: All else equal, in jurisdictions where regulators are more independent, foreign firms will receive monetary penalties that are more similar to the penalties assessed on domestic firms.

2.3.3 Judicial Review

Independent courts could provide another institutional constraint on economic patriotism in globalized regulatory enforcement. Although courts have not been a major focus of political economy studies of the regulatory state, scholars of the law and regulation have long noted the importance of courts in regulatory policymaking and implementation (Kelemen, 2011; Kelemen & Sibbitt, 2004; Majone, 1994). A core principle in 'rule of law' discourse is that all persons, including corporate persons, should be treated equally under the

law, and that similar cases should be treated similarly (Sunstein, 1989; Tobler, 1999). Although judicial review has proven to be a mostly ineffective device for addressing the problem of non-enforcement (Sarat & Clarke, 2008), judges are better positioned to ensure that, when companies are sanctioned, penalties are consistently applied. For instance, empirical studies of judicial review in competition decisions suggest that courts often use their review authority to ensure that monetary penalties conform with established fining guidelines (Geradin & Henry, 2005; Paemen & Blondeel, 2017). It is therefore reasonable to expect that juridification, or the increasing involvement of courts in regulatory policymaking and enforcement (Ginsburg, 2008; Shapiro & Sweet, 2002), will also moderate economic patriotism in globalized regulatory enforcement.

Hypothesis 2c: *All else equal, in jurisdictions where courts are more involved in competition decisions, foreign firms will receive monetary penalties that are more similar to the penalties assessed on domestic firms.*

3.0 Logic of Case Selection

To empirically assess the role of economic patriotism in globalized regulatory enforcement, I examine the enforcement of horizontal cartel rules across 33 OECD countries and the European Commission. The case selection is motivated by both theoretical and practical considerations. From a Bayesian perspective, cartel enforcement can be understood as a "crucial case" which can be used to assess the extent of economic patriotism in regulatory enforcement (Eckstein, 1975; Gerring, 2006, 2007). Cartel enforcement is widely seen as an area that is no longer shaped by economic nationalism, and which is governed by technocratic criteria (Bradford, Chilton, Megaw, & Sokol, 2019). Consequently, if I observe economic patriotism in cartel enforcement, where the theory suggests it is "least likely" to emerge, this finding would increase confidence in the economic patriotism thesis (J. S. Levy,

2008, p. 12). In particular, it would increase the probability that economic patriotism would be observed in regulatory enforcement within 'more likely' sectors—such as technology policy, finance, or energy—which impinge more directly on national security and economic interests.

Cartel enforcement is also an appropriate area in which to examine whether the institutional setting conditions the level of economic patriotism in globalized regulatory enforcement. In the competition arena, the last three decades have been marked by major efforts to strengthen the professionalization and accountability of regulatory agencies. Most countries have established independent competition agencies that empower technocrats with significant control over enforcement decisions (Alemani, Klein, Koske, Vitale, & Wanner, 2016). Alongside these reforms, many jurisdictions have strengthened the role of courts in reviewing competition law decisions (OECD, 2011). In the face of a number of a number of high-profile transatlantic regulatory disputes, the International Competition Network (ICN) was established as a multi-lateral forum designed to foster more effective, better coordinated, and more harmonized competition systems around the world (Damro, 2006). The ICN is perceived as making significant progress in both reducing international regulatory disputes and developing and disseminating common policies and practices across its membership (Djelic & Kleiner, 2006; Hollman & Kovacic, 2011). Variation across each of these institutional factors provides an opportunity to assess whether institutional design conditions competition enforcement.

Finally, several practical considerations have led me to focus this study on international cartel enforcement. The first relates to the frequency of globalized regulatory enforcement in this policy area. Not only do most competition authorities regularly pursue enforcement actions against both foreign and domestic companies, but the majority of these involve monetary penalties which can be adjusted for the size and gravity of cartel violations.

This, in turn, offers a rare opportunity to quantitatively compare how regulators treat foreign and domestic firms in response to similar regulatory violations, making it possible to systematically assess the economic patriotism thesis.

A second practical consideration is the availability of comparative data. A team of researchers at Columbia Law School have recently compiled extensive information about competition laws and institutions in more than 130 countries (Bradford et al., 2019). As part of this project, they have also developed new measures on the stringency of cartel rules, the independence of regulatory institutions, and the quality of judicial review. The availability of these indicators makes it possible to quantitatively assess whether differences in law and institutional design systematically affect the comparative treatment of foreign and domestic firms.

4.0 Empirical Analysis

To empirically assess the role of economic patriotism in cartel enforcement, I use the Private International Cartels (PIC) Data Set.[5] The largest collection of anti-cartel enforcement actions involving international cartels, PIC has been used by both academics and policymakers. In 2020, the dataset was purchased by the OECD, where it will be maintained and updated for the foreseeable future. The dataset includes information about 1,304 cartel investigations, involving 11,526 companies that were sanctioned for cartel violations from 1990 to 2019. This includes extensive company-level and cartel-level data covering a wide range of characteristics including industry sector, the legal domicile of companies, fine totals, cartel-affected commerce, and estimated consumer overcharge. This data makes it possible to both generate comparative estimates of fine severity while also controlling for industry- and cartel-level characteristics.

[5] The dataset is publicly available at < https://purr.purdue.edu/publications/2732/about?v=2>.

Although the dataset includes some information on enforcement actions concluded by 74 regulatory jurisdictions, information on cartel-affected commerce and estimated consumer overcharge is available for a smaller number of jurisdictions. For some of the covariates of interest, information is only available for OECD and a few select non-OECD countries. In the interest of examining comparable countries with reliable indicators, I limit the analysis to 33 OECD countries as well as the European Commission.[6]

To compare the severity of enforcement across foreign and domestic firms, I analyze three separate measures. The first measure, *fines*, is the fine total, calculated in 2015 USD millions. The second measure, *commerce-adjusted fines*, reports the monetary penalty as a percentage of affected cartel-wide commerce. This allows us to assess the severity of the fine given differences in the size of economic activity affected by different cartel agreements. The third measure, *overcharge-adjusted fines*, reports the monetary penalty as a percentage of estimated consumer overcharge. This final measure gets closest to an estimate of the economic harm caused by the cartel—at least according to standard measures used by neoclassical economists.

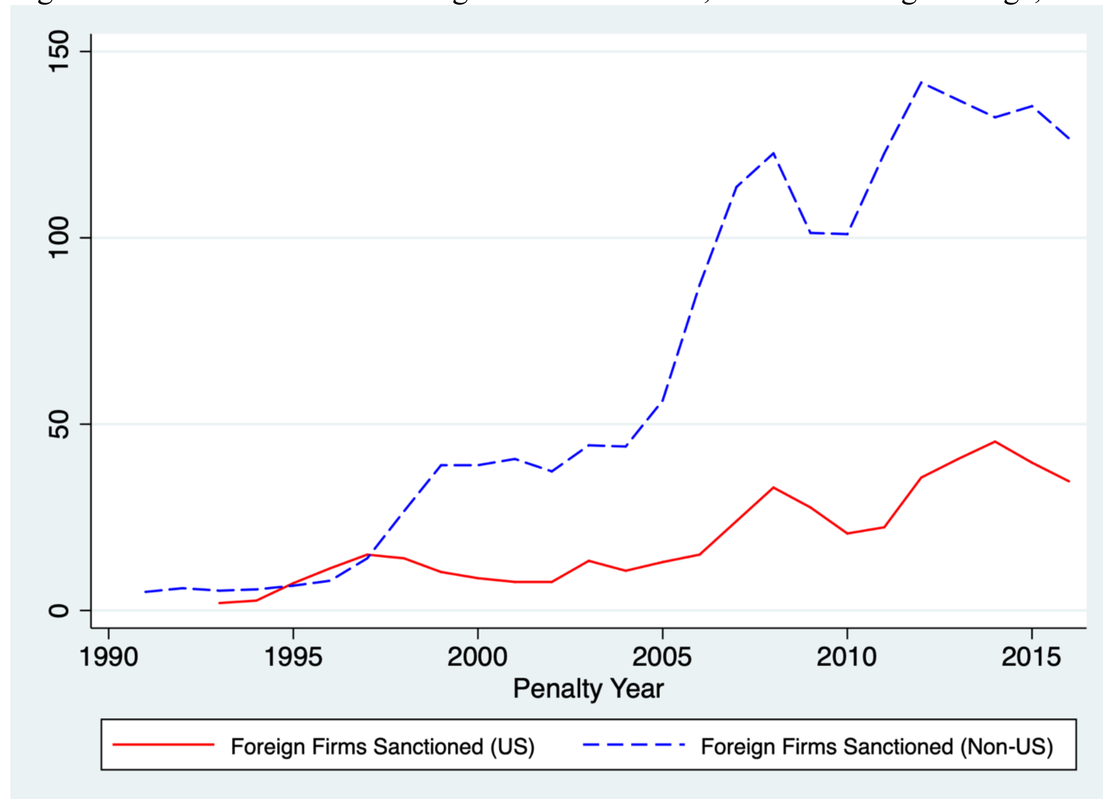
To identify which cartel sanctions are applied on domestic versus foreign companies, I use information included in the dataset about where a company is legally incorporated. I use the parent company, rather than the subsidiary, to determine domicile status. However, in the online appendix, I also report all results using the domicile status of the subsidiary. A company is considered to be foreign if a company's legal domicile is different than the regulator taking the leading role in the case.

[6] In two OECD countries, Ireland and Slovenia, no penalties were reported in the dataset.

4.1 Longitudinal Trends in Enforcement

I begin the empirical analysis by examining the general incidence of foreign corporate prosecutions since 1990. Figure 1 reports the number of cartel sanctions against foreign domiciled firms in the United States and other OECD jurisdictions from 1990 to 2016. Over this period, the number of sanctions against foreign firms has steadily increased, moving from a few dozen per year in the early 1990's, to an average of several hundred each year throughout the 21st century. The longitudinal data shows that enforcement is no longer limited to large jurisdictions such as the United States. In fact, OECD jurisdictions outside of the United States assessed a greater number of cartel sanctions on foreign countries—nearly three times more overall. As economic globalization has intensified, and more foreign companies have become involved in domestic markets, foreign corporate prosecutions have proliferated. This trend can be seen in both large countries such as Japan and Germany and smaller jurisdictions such as Chile, Latvia, and Belgium.

Figure 1: Number of Annual Foreign Cartel Sanctions, 3-Year Moving Average, 1990-2016



Source: Author's Calculation using PIC Database.

Table 1 reports the average and median penalties assessed on foreign and domestic companies in OECD jurisdictions. Fine totals are reported in 2015 US dollars. We can see that, over the period 1990-2017, regulators sanctioned at least 1,385 foreign firms for cartel violations. American regulators were responsible for many of the largest penalties, assessing $7.92B of fines on 282 foreign firms over the period. However, non-US jurisdictions pursued an even greater number of foreign firms, fining 1,103 foreign corporations $18.10B. The descriptive information indicates that most jurisdictions have assessed a significant number of cartel sanctions on both foreign and domestic firms.

Table 1: Summary Statistics, OECD Total

	N	Mean	Median
Penalties (Foreign)	1385	18.786	2.846
Penalties (Domestic)	3617	11.131	.313
Commerce-Adjusted (Foreign)	1157	6.803	.167
Commerce-Adjusted (Domestic)	3164	2.185	.009
Overcharge-Adjusted (Foreign)	407	30.313	2.243
Overcharge-Adjusted (Domestic)	1803	3.685	.053

Source: Author's Calculation using PIC Dataset.

In raw monetary terms, foreign corporate penalties were slightly higher than domestic penalties. Foreign companies received a mean penalty of $18.79B, compared to $11.13B for domestic companies. A more substantial gap can be observed when we compare fine severity as a percentage of cartel-affected commerce and estimated consumer overcharge. Foreign companies received an average penalty equal to around 6.8% of affected commerce and 30.3% of estimated consumer overcharge. However, average domestic penalties were substantially lower: only 2.2% and 3.7%, respectively. As a first level of analysis, these figures suggest that foreign firms receive average penalties that are 200-700% more severe than similarly situated domestic firms.

4.2 Multi-Level Model Analysis

The reporting of country means and medians, while informative, only reveals so much about the overall empirical pattern. To start, a small number of extremely high penalty amounts skew the penalty averages, leading the means of each measure to be significantly larger than the medians. A comparison of means also provides no information about whether the same regulators sanction foreign and domestic firms differently, and whether these differences are conditioned by country-, industry- or cartel-level factors. Nor can such totals account for unobserved changes over time that may have affected the longitudinal pattern of enforcement or differences in the underlying characteristics of firms or jurisdictions.

To conduct a more rigorous assessment of the pattern of enforcement, I develop several quantitative regression models. In each model, I regress the binary indicator of a company's foreign domicile status onto the three fine measures described in the previous section: (1) a raw fine total in USD millions, (2) a commerce-adjusted fine measure that reports the fine as a percentage of a company's individual sales in terms of cartel-affected commerce, and (3) an overcharge-adjusted figure that reports the fine as a percentage of estimated consumer overcharge. I calculate each of these indicators using measures that can be found in the PIC dataset.

The company-level data is hierarchically structured, with company penalties usually assessed as part of cartel-wide prosecutions by specific jurisdictions. Where individual observations are nested within larger units, standard procedure is to use a multi-level "random effects" model with random intercepts for each of the larger units of interest (Gelman, 2006). Multi-level models provide a way of taking into account the hierarchical nature of the data while still analyzing *both* between and within-jurisdiction variation (Bryan & Jenkins, 2013; Giesselmann & Schmidt-Catran, 2019). Since the data has a three-level nested structure, I run an OLS regression analysis with random intercepts for jurisdiction and

cartel (Gelman, 2006). The inclusion of these intercepts helps ensure that I do not underestimate standard errors, and therefore overstate the statistical significance of jurisdiction-level explanatory variables.

Since the dependent variable has a strongly positively skewed distribution, I log-transform all three dependent variables. By making the residuals more symmetrically distributed, log transformation makes regression analysis more statistically valid. To address unobserved changes over time, I include year dummies that signify the year that a company was sanctioned. 1990 serves as the baseline year. In order to assess jurisdiction-level determinants of sanctioning practices, I examine only cases where a company was sanctioned by a single jurisdiction. This means excluding around 15% of sanctions that resulted from joint investigations. Since fine amounts could be systematically affected by differences in the types of industries that are sanctioned between domestic and foreign firms, I include controls for market type across six basic categories: raw material, industrial intermediate input, industrial capital good, generic final consumer good, differentiated final consumer good, and services. Differentiated final consumer goods serves as the baseline.

I also include a number of country-level controls. Fine severity is likely, in part, a function of the stringency of a country's competition system. To account for differences in competition law, I include a measure for the stringency of a jurisdiction's prohibition against anti-competitive agreements, developed by a team of researchers at Columbia University (Bradford et al., 2019). Economic size or circumstance may lead some jurisdictions to assess higher or more severe sanctions. Regulators may also differ in their capacity or willingness to take on the challenge of prosecuting large, foreign firms. Since economically larger and wealthier countries may have more capacity to pursue complex investigations of foreign cartels, I include a World Bank measure for the size of a country's GDP as well as its per capita income. Because foreign corporate prosecutions may depend on the degree to which

foreign domiciled firms are active, I include a country's annual foreign direct investment as a percentage of GDP. I also include an indicator of inflation, since an increase in consumer prices may lead regulators to intensify international cartel enforcement. To account for the fact that members of the European Union are subject to the same competition law, I include a dummy variable indicating EU membership. To improve comparability, each of the country level variables have been rescaled to have a mean of zero and standard deviation of one.

In theory, a sanction of no fine could reflect regulatory forbearance, or "intentional and revocable government leniency toward violations of the law" (Holland, 2016, p. 233). However, for most countries, the existing data only reports cases which were formally pursued by regulators, not the total number of cases that regulators investigated. Even when a zero penalty is reported, the database does not distinguish between situations where companies received no penalty because the case ended in a consent decree that did not involve fines, situations where the case was dismissed for other reasons, or situations where fine information was simply not reported. For these reasons, I have limited the analysis to sanctions that resulted in a fine greater than zero.

4.3 Model Results

In Model 1, I analyze the effect of foreign firm status on fine severity across the three different measures. Table 2 reports the results. The initial observation that foreign firms receive higher penalties can also be found in models that account for underlying differences in cartel-level characteristics, panel-wide changes over time and the nested structure of the data companies. Across all three measures of penalty severity, foreign domicile status is strongly associated with higher penalties.

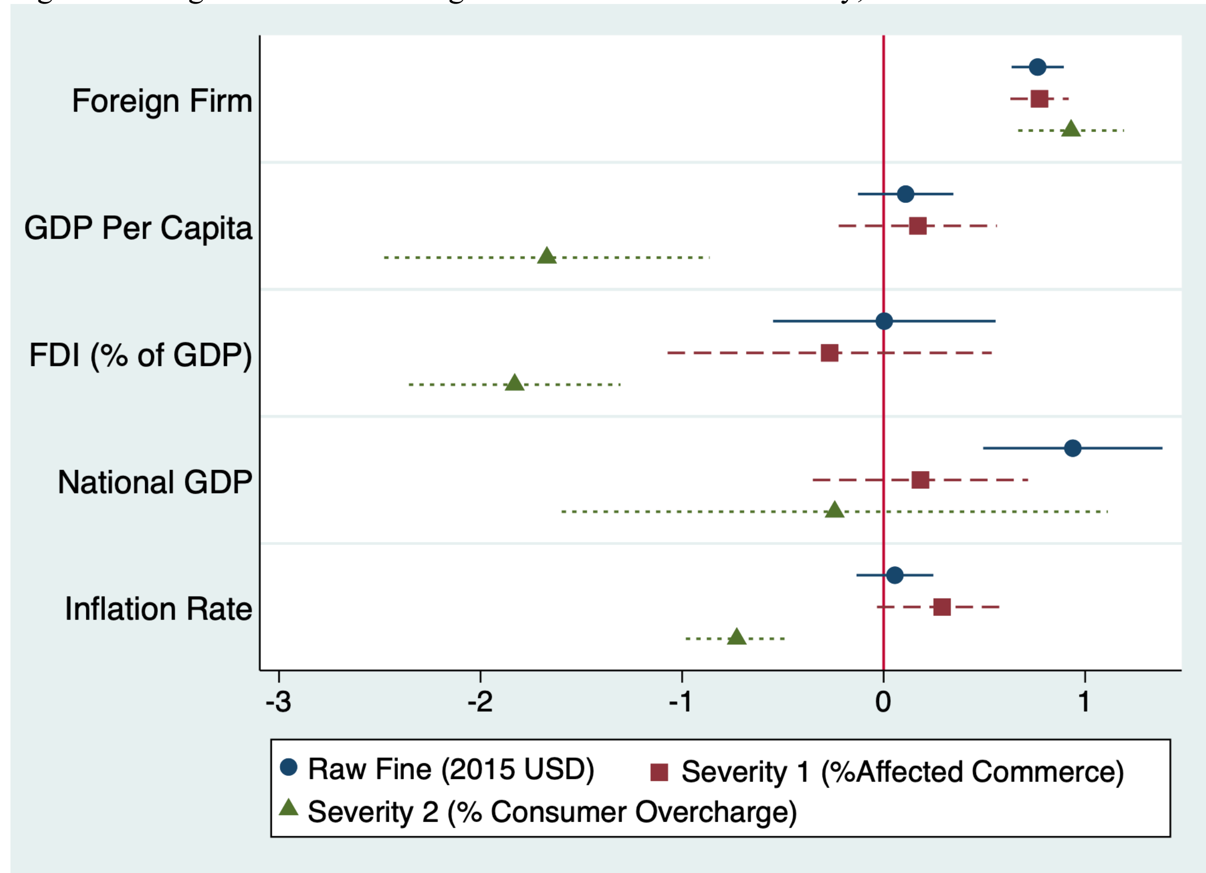
Table 2 -- Determinants of Fine Severity, Models 2 and 3

	Raw Penalty		Commerce-Adjusted Penalty (% of Cartel-Commerce) (2)		Overcharge-Adjusted Penalty (% of Est. Overcharge) (3)	
	Model 2a	Model 3a	Model 2b	Model 3b	Model 2c	Model 3c
Foreign Firm	0.764*** (0.000)	0.400* (0.027)	0.773*** (0.000)	0.373* (0.046)	0.930*** (0.000)	0.421 (0.060)
Generic Final Consumer	-0.285 (0.442)	-0.302 (0.416)	1.147 (0.054)	1.123 (0.060)	-0.657 (0.175)	0.988 (0.315)
Industrial Intermediate	-0.126 (0.631)	-0.132 (0.615)	0.245 (0.556)	0.238 (0.568)	-0.587* (0.035)	0.123 (0.858)
Industrial Capital Good	-0.512 (0.170)	-0.513 (0.169)	0.477 (0.432)	0.471 (0.437)	-0.0989 (0.833)	0.931 (0.396)
Raw Material	-0.739 (0.183)	-0.787 (0.158)	0.954 (0.258)	0.890 (0.295)	-0.0323 (0.955)	1.308 (0.331)
Services	-0.270 (0.279)	-0.276 (0.268)	-0.714 (0.079)	-0.719 (0.076)	-1.041*** (0.000)	-0.0238 (0.970)
GDP Per Capita USD Thousands	0.109 (0.365)	0.0918 (0.452)	0.170 (0.397)	0.147 (0.468)	-1.671*** (0.000)	-0.188 (0.488)
FDI (% of GDP)	0.00331 (0.991)	-0.0147 (0.959)	-0.268 (0.514)	-0.280 (0.496)	-1.830*** (0.000)	-0.577 (0.266)
Overall GDP	0.939*** (0.000)	0.937*** (0.000)	0.183 (0.502)	0.185 (0.498)	-0.243 (0.726)	0.174 (0.444)
Inflation Rate	0.0560 (0.565)	0.0509 (0.601)	0.291 (0.079)	0.282 (0.089)	-0.728*** (0.000)	0.00400 (0.985)
Cartel Law Stringency	1.513 (0.125)	1.358 (0.172)	1.145 (0.378)	0.979 (0.456)	-8.328*** (0.000)	3.802* (0.012)
EU Member	0.747 (0.054)	0.701 (0.071)	0.344 (0.511)	0.294 (0.576)	-4.587*** (0.000)	0.190 (0.699)
ICN Member		-0.816 (0.356)		-0.881 (0.529)		1.185 (0.472)
Foreign Firm* ICN Member		0.418* (0.031)		0.473* (0.020)		0.555* (0.036)
Observations	5002	5002	4313	4313	2202	2202

p-values in parentheses
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

As can be seen in Figure 2, which reports the average marginal effect of key variables in Model 2 across the three fine severity measures, these effects are also substantively significant. The model predicts that, holding other variables at their means, foreign domiciled companies will receive fines that are 114% higher in raw dollar amounts, 116% higher in terms of affected commerce, and 153% higher as a percentage of estimated consumer charge.

Figure 2: Marginal Effect of Foreign Firm Status on Fine Severity, Model 2



Source: Author's Calculation using PIC Dataset.

This relationship is robust across a number of different model specifications, including an examination of non-OECD countries, the exclusion of active regulators such as the US DOJ and European Commission, and an analysis of shorter periods of time. It is also present when I run a two-level model with random intercepts only for jurisdiction and when I add a range of other industry and cartel-level controls.

In Models 2-4, I examine whether institutional factors condition the treatment of foreign firms. Building on the theoretical discussion from the previous section, I use factor analysis to consider whether three specific institutional arrangements limit or discourage economic patriotism in cartel enforcement. With factor analysis, two independent variables are interacted with each other to assess whether the effect of the first independent variable on the outcome variable of interest changes at different levels of the second independent

variable. Since my substantive interest in this case is to ascertain the effect of foreign domicile status on fine severity conditioned by different institutional settings, I run three separate analyses, one for each of the institutional theories outlined in the theoretical discussion: (1) membership in the ICN, (2) the independence of competition agencies and (3) the strength of judicial review. I maintain all of the cartel-level and country-level variables employed in earlier models as well as year fixed effects.

To measure whether internationalization makes a difference, I use a measure for whether a country was part of the International Competition Network, which is provided in the Columbia University dataset. To measure the effect of regulatory independence on the treatment of foreign firms, I use another indicator produced by the Comparative Competition Law Database at Columbia Law School, which asks close observers to rate the independence of each country's competition system. The scale ranges from a "1," indicating that an "Agency is Not at all Independent," to a "5" indicating that an "Agency is Completely Independent." Finally, to measure the involvement of independent courts in regulatory proceedings, I use another expert indicator, which ranks the involvement of courts in a country's competition systems. Systems where "courts play an extensive role" are ranked a "5, "while systems where "courts play no role" are ranked a "1."

The regression results provide no evidence that membership in the ICN moderates economic patriotism. As can be seen in Columns 3, 5 and 7 of Table 2, ICN membership does not appear to systematically moderate economic patriotism in international cartel enforcement. Across two of the three measures, the interaction term between foreign firm status and ICN membership is not statistically significant. In the third case, the sign of the coefficient is positive, suggesting that membership in the ICN is associated with greater discrimination against foreign firms. This is the opposite of my theoretical expectations and provides further evidence that technocratic institutions, at least according to the best available

Table 3, Determinants of Fine Severity, Factor Analysis with Agencies and Courts

	Raw Penalty		Commerce-Adjusted Penalty (% of Cartel-Commerce) (2)		Overcharge-Adjusted Penalty (% of Est. Overcharge) (3)	
	Model 4a	Model 5a	Model 4b	Model 5b	Model 4c	Model 5c
Foreign Firm	1.368^{**} (0.002)	0.282 (0.302)	1.387^{**} (0.004)	-0.0476 (0.884)	2.805^{**} (0.006)	1.023 (0.128)
Agency Independence	-0.0108 (0.971)		-0.0893 (0.824)		0.449 (0.409)	
Foreign Firm * Agency Independence	-0.141 (0.179)		-0.149 (0.197)		-0.462^{*} (0.049)	
Generic Final Consumer	-0.317 (0.401)	-0.319 (0.398)	1.170^{*} (0.049)	1.135 (0.057)	1.051 (0.286)	0.995 (0.313)
Industrial Intermediate	-0.130 (0.619)	-0.150 (0.567)	0.254 (0.543)	0.222 (0.594)	0.0777 (0.910)	0.0451 (0.948)
Industrial Capital Good	-0.515 (0.168)	-0.521 (0.162)	0.470 (0.439)	0.477 (0.432)	0.900 (0.416)	0.841 (0.446)
Raw Material	-0.707 (0.202)	-0.738 (0.183)	0.960 (0.256)	0.912 (0.281)	1.400 (0.298)	1.429 (0.289)
Services	-0.270 (0.279)	-0.286 (0.252)	-0.713 (0.079)	-0.746 (0.066)	-0.0563 (0.929)	-0.0701 (0.912)
GDP Per Capita USD Thousands	0.169 (0.162)	0.160 (0.179)	0.191 (0.351)	0.156 (0.433)	-0.147 (0.588)	-0.144 (0.600)
FDI (% of GDP)	0.0180 (0.948)	-0.00138 (0.996)	-0.247 (0.549)	-0.318 (0.437)	-0.640 (0.230)	-0.549 (0.304)
Overall GDP	0.973^{***} (0.000)	0.941^{***} (0.000)	0.231 (0.445)	0.300 (0.297)	0.0782 (0.805)	0.155 (0.549)
Inflation Rate	0.0465 (0.651)	0.0436 (0.669)	0.299 (0.073)	0.297 (0.072)	0.00250 (0.991)	0.0183 (0.931)
Competition Law Stringency	1.700 (0.079)	1.650 (0.084)	1.264 (0.345)	0.934 (0.469)	3.425^{*} (0.033)	3.930^{*} (0.013)
EU Member	0.974^{*} (0.011)	0.971^{*} (0.010)	0.382 (0.475)	0.389 (0.451)	0.0881 (0.861)	0.173 (0.726)
Court Involvement		-0.0420 (0.820)		-0.375 (0.133)		0.138 (0.673)
Foreign Firm* Court Involvement		0.133 (0.055)		0.211^{*} (0.010)		-0.0516 (0.752)
Observations	4948	4948	4313	4313	2202	2202

p-values in parentheses
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

measures, do not appear to systematically moderate economic patriotism in globalized regulatory enforcement. If anything, such institutions may inadvertently increase economic patriotism by strengthening regulatory capacity and disseminating new regulatory technologies that can be used in complex international enforcement cases.

Table 3 reports the results for independent regulatory agencies and judicial review. As in the previous model, foreign firm status is associated with higher penalties across all three dependent variables. However, there is not a consistent indication of regulatory independence moderating this differential. The interaction term between agency independence and foreign firms has a null effect across all three dependent variables. Similar results are found when I run simpler models and alternative periods of time. A null effect is also found when I use an alternative measure for regulatory independence developed by the OECD. Notably, foreign firm remains a strong predictor of more severe penalties across all three measures.

More extensive judicial review, at least as measured by expert observers, also does not appear to reduce the discriminatory treatment of foreign firms (Model 4). As can be seen in Columns 3, 5 and 7, in two of the three measures, the interaction term for foreign firm and court involvement has a positive coefficient, which is statistically significant for the severity measure when calculated as a percentage of cartel-affected commerce (Model 4b). Specifically, jurisdictions with more extensive judicial review treat foreign firms more severely relative to domestic firms than jurisdictions with less extensive judicial review. Once again, this is the opposite of the theoretical expectation that court involvement would moderate foreign discrimination. Although it is possible that different measures of court involvement and regulatory agency independence would generate different results, available measures suggest that the quality of judicial review does not systematically reduce foreign firm discrimination.

5.0 Discussion and Conclusion

I am certainly not the first to argue that regulatory policy and enforcement can be used to benefit economic insiders or hurt economic outsiders. A rich literature has detailed how economic liberalization and integration have reconfigured rather than ended the role of

economic nationalism in economic policy (Block, 2008; Bulfone, 2020b; Clift & Woll, 2012; Mazzucato, 2013; Thatcher, 2014b; Volberding, 2020). The main empirical contribution of this article has been to explore the dynamics of economic patriotism in the context of globalized regulatory enforcement. Developing several innovative measures of fine severity that take into account differences in the economic size and harm of cartels, I have provided quantitative evidence that foreign firms are systematically treated more severely in competition enforcement actions. This relationship is robust across a number of different model specifications, including an examination of non-OECD countries, the exclusion of active regulators such as the US DOJ and European Commission, and an analysis of shorter periods of time. It is also substantively significant. Multi-level regression models suggest that regulators assess fines that are 100-150% more severe than domestically domiciled companies that commit similar regulatory violations.

At the same time, I have found no systematic evidence that either independent competition agencies or judicial review systematically reduces or constrains economic patriotism in globalized regulatory enforcement. I have also found little evidence that membership in transnational regulatory networks leads to less discriminatory enforcement patterns. To the contrary, membership in the ICN is associated with greater discriminatory treatment of foreign firms. Although technocratic institutions may have other benefits, such as strengthening regulatory professionalism or increasing enforcement capacity, they do not appear to moderate, and may even reinforce, economic patriotism in globalized regulatory enforcement.

This article represents one piece of evidence for the role of economic patriotism in regulatory enforcement, focusing on one policy area, using one dataset. The measures I use are, by their nature, limited. The assessments of regulatory independence and judicial review is based on expert surveys that are not time-varying and may be biased. Membership in the

ICN does not capture how and in what ways regulators interface with transnational regulatory networks. The findings have been based on an examination of patterns in the past, which may not hold in the future if markets become more fragmented or international networks less effective. And it should be clear that the nature of observational data renders it impossible to make clearly identified causal claims, which would require a quasi-experimental setting that is rare in the real world of regulatory policy and law enforcement. Nonetheless, I believe that I have provided evidence that strongly suggests that regulatory enforcement can be used as a tool of economic patriotism and that economic patriotism in globalized regulatory enforcement is now a widespread phenomenon which systematically affects regulatory sanctions in jurisdictions around the world.

What implications do these findings have for the political economy of law enforcement? One theme touched on throughout this special issue is that enforcement entails exercising discretionary power. Because regulators have limited resources and information, they can never fulfill the Weberian expectation that a law will be universally enforced across a given jurisdiction. Consequently, in determining where and how the law is partially applied, public officials must exercise discretion. In the analysis of globalized cartel enforcement presented here, I have provided evidence that globalized law enforcement, like its domestic counterpart, always involves the exercise of discretionary power.

A second takeaway is that public officials' discretionary enforcement choices—to varying degrees and in different ways across institutions and policy domains—are affected by territorially-defined politics. The tendency to show greater forbearance to domestic firms, or to assess more severe fines on foreign companies, reflects a political logic that gives advantage to territorial insiders and disadvantage to territorial outsiders. The link between enforcement choices and territorial interests could stem from a number of different mechanisms that have been noted in the literature, including interest group demands,

electoral considerations, and even a perception by regulators that favoritism is in the public interest. Whatever its source, a territorially defined political logic leads economic insiders to be relatively advantaged in globalized regulatory enforcement and economic outsiders to be relatively disadvantaged.

Finally, this study provides strong empirical evidence that globalized regulatory enforcement can be a powerful form of economic patriotism. Analyzing one area of policy, I have shown that foreign firms receive fines that are two to three times more severe. In a context where a single fine can amount to hundreds of millions or even several billion dollars, such systematic differences in fine severity can have a substantial effect on firm competitiveness. Although certainly not as explicit as a direct subsidy or as inflexible as a law that prevents foreign companies from entering a market, globalized regulatory enforcement can nevertheless serve as a distortionary intervention that significantly advantages domestic firms over foreign ones.

Together, these empirical contributions provide additional evidence that liberal forms of economic policy can be applied in ways that advantages territorial insiders (Clift & Woll, 2012; Helleiner & Pickel, 2005; Levi-Faur, 1997). Far from a 'retreat of the state' in the economy (Strange, 1996), or a reconfiguration of state policy toward "market-supporting" interventions (J. D. Levy & Levy, 2006), the processes of economic liberalization and globalization are better understood as shifting the 'instruments' through which states pursue economic patriotism (Lascoumes & Le Galès, 2004). Although traditional forms of industrial policy such as tariffs or subsidies have become more difficult, these goals can be achieved through alternative instruments such as globalized regulatory enforcement.

That these patterns are found during a moment of high economic liberalism, where tariffs are at record lows and trade and investment flows record highs, suggests that economic patriotism can affect regulatory patterns across different regulatory paradigms. The fact that

foreign discrimination is observed within a highly technocratic and internationalized area of policy, also indicates that economic patriotism is a pervasive phenomenon that may be difficult to eliminate through conventional reform strategies such as independent regulatory authorities, judicial review, or transnational regulatory networks. Indeed, by increasing regulatory capacity and facilitating the dissemination of new regulatory technologies, international fora may inadvertently increase discrimination in globalized regulatory enforcement. Although economic integration and liberalization may alter the means, as long as political communities are defined territorially, policymakers are likely to continue to privilege domestic interests over foreign ones.

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