element of a multiplied award is clearly separable from the multiplied addition to that compensatory element, and it would be easy for the compensatory element to be deemed enforceable and the multiplied element be deemed unenforceable. However, with such clear wording in the Act, and consequentially the tendency of the English courts to consider themselves statutorily barred from enforcing multiple-damage judgments, it is unlikely that such an argument would achieve much success.

In the Court of Appeal, Lewis concentrated on the damages for fraud and breach of fiduciary duty and did not attempt to enforce the RICO portion of damages. This means that Lewis v Eliades does not provide us with a clear answer as to whether the purely compensatory part of a multiplied award is enforceable. However, Jacobs LJ has clearly left this question open and there does appear to be the basis for an argument that the compensatory element of an award will be enforceable providing no multiplication is sought, and perhaps could be enforceable even if multiplication does occur, if an undertaking is given to the court not to seek the enforcement of the multiplied element of the multiple award.

The moral of the story is to settle for an award of RICO damages without multiplication, or if the basic award is in the process of being multiplied, perhaps to undertake not to enforce the multiplied element. Otherwise, if any multiplication takes place one is effectively penalized for seeking a penalty.

Although questions remain, therefore, as to whether the compensatory element of a multiple award can be enforced, Lewis v Eliades does settle the question of whether a judgment, consisting in part of a multiplied award and in part of other heads of damages, can be enforced save as to that multiplied award. This case also highlights the importance of enforcement concerns and shows that the framing of the allegations, the complaint, the pleading, the causes of actions and issues of service of process should all be informed by enforcement concerns from the outset of a claim to ensure the maximum return for the foreign judgment creditor, and to avoid and minimize any defence to the enforcement of a judgment.

ELAINE KELLMAN

II. THE ANTI-SUIT INJUNCTION IN THE EUROPEAN JUDICIAL SPACE: TURNER v GROVIT

A. Introduction

This case deals with the use of the English law anti-suit injunction in combination with the Brussels Convention. That Convention has since been replaced by the so-called Brussels I Regulation. The Regulation kept the structure and basic rules of the Convention so that this judgment will stay effective and the rule established by it will apply equally under the Regulation.

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B. Facts

To understand the link with the different legal systems, a chronological analysis of the facts, as described by the judgment of the House of Lords,4 is necessary.

Mr Turner was a British lawyer domiciled in the United Kingdom. He had been employed in 1990 by the Chequepoint Group, a group of companies directed by Mr Grovit, as ‘Group Solicitor’. The business of the group of Companies was running various bureaux de change. Mr Turner’s contract had initially been with China Security Ltd, but was taken over by the end of 1990 by Chequepoint UK Ltd, both member companies of the Chequepoint Group. Mr Turner performed his work in London, but he sometimes had to travel for his work.

In May 1997 he asked for a transfer to Madrid (Spain) and started working there at the premises of Changepoint, a Spanish company of the Chequepoint Group, in November 1997. Chequepoint UK Ltd was taken over by another company in the group, Harada, on 31 December 1997. On 16 February 1998 Mr Turner gave notice of his resignation to Harada. He did not return to the office in Madrid, where he had only worked for 35 days. Back in London, on 2 March 1998, Mr Turner brought an action against Harada before the Employment Tribunal. He argued that they had tried to implicate him in illegal conduct and that that amounted to unfair dismissal. Harada contested the jurisdiction of the Tribunal. It stated that it was incorporated in Ireland and Mr Grovit was resident in Belgium. On 10 September 1998 the Court found that it had jurisdiction, based on Harada’s domicile in the United Kingdom. Harada appealed that judgment to the Employment Appeal Tribunal on 14 October 1998. On 21 October 1998, after attempted conciliation, Changepoint brought proceedings against Mr Turner for damages for losses occurring from his professional conduct in a court of first instance of Madrid. The appeal to the Employment Appeal Tribunal was dismissed and Mr Turner was awarded damages.

The summons in the Spanish proceedings was served on Mr Turner in London around 15 December 1998. Mr Turner did not take any steps in that procedure, but sought an anti-suit injunction from the High Court of Justice of England and Wales on 18 December 1998. The purpose of the injunction was to restrain Chequepoint from continuing and Mr Grovit and Harada from commencing proceedings in Spain. An interlocutory injunction was issued on 22 December 1998, but the High Court refused to extend that injunction on 24 February 1999.5

C. The Court of Appeal6

Mr Turner appealed to the Court of Appeal (England and Wales). That Court issued an injunction restraining the defendants from continuing the proceedings commenced in Spain and from commencing other proceedings in Spain or elsewhere against Mr Turner regarding his contract of employment (on 28 May 1999). The reasons for the judgment stated that the proceedings in Spain had been brought in bad faith and to vex Mr Turner’s application before the Employment Tribunal in London.

5 Turner v Grovit [1999] 1 All ER (Comm) 445.
The Court of Appeal considered the relevance of the Brussels Convention and stated:

[W]ere the English court to find that the proceedings had been launched in another Brussels Convention jurisdiction for no purpose other than to harass and oppress a party who is already a litigant here, the English court possesses the power to prohibit by injunction the plaintiff in the other jurisdiction form continuing the foreign process.7

Upon assessing the facts the Court found that the proceedings in Spain were merely abusive and vexatious. It thought that the parties had to be restrained from further acting in a way that abused the proceedings in the Employment Tribunal. The Court was of the view that, by granting the injunction, it was not being disrespectful to the Spanish court, but rather protecting the proper application of the Brussels Convention.8

On 28 June 1999 Changepoint discontinued the proceedings pending before the Spanish court. This was done by way of a desisitimiento, which did not prejudice their rights: there was no waiver of the cause of action or right to bring a further action.

D. The House of Lords and the Preliminary Question

Subsequently, Mr Grovit, Harada, and Changepoint appealed to the House of Lords on the ground that the English courts did not have the power to make restraining orders preventing the continuation of proceedings in other States bound by the Brussels Convention. The House of Lords considered the interpretation of European Union law important in the case before them. For that reason they referred a preliminary question to the European Court of Justice:

Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?9

In the referring judgment the House of Lords carefully explained the legal phenomenon of an anti-suit injunction. Although it emerged from case law,10 the injunction was now based on statutory law: ‘The High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so.’11

An anti-suit injunction was based on the presumption that the English courts had in personam jurisdiction over parties to proceedings pending before them. Therefore the English courts had the right to prescribe a code of conduct to them. And this code of

8 Ibid at 364.
9 Ibid at 11; OJ 2002 C 169/18.
11 Supreme Court Act 1981, s 37(1).
conduct could include actions towards other courts: parties could be prohibited from bringing or continuing proceedings before other courts. This prohibition, as viewed by the English courts, did not interfere with the sovereignty of other courts, but only told the parties how to act while under the auspices of the English courts. The injunction did not in any way comment on the jurisdiction of the foreign court. In that sense, the terminology 'anti-suit' injunction was misleading, the House of Lords explained.

The House of Lords was conscious of the comity problems that anti-suit injunctions could bring about. For that reason the English courts were reluctant to take upon themselves the decision of whether the foreign forum was an inappropriate one. In the sphere of application of the Brussels Convention, an English court would not venture to make that decision.

According to the House of Lords there was nothing in the Brussels Convention which prohibited anti-suit injunctions. Furthermore, the anti-suit injunction was an effective mechanism to prevent irreconcilable judgments, which was one of the purposes of the Brussels Convention. In the case under discussion, irreconcilable judgments would be prevented by the anti-suit injunction.

The fact that the mechanism did not exist in the legal systems of other European Union Member States was not problematic since the purpose of the Brussels Convention was not uniformity, but rather the creation of clear rules on jurisdiction.

The House of Lords summarized the essential features of an anti-suit injunction as follows:

(a) The applicant is a party to existing legal proceedings in the country;

(b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in this country;

(c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants.\(^{12}\)

The Law Lords added that, if they had to interpret the question, they would have had no problem with finding the anti-suit injunction compatible with the Brussels Convention.\(^ {13}\)

E. The European Court of Justice

Advocate-General Ruiz-Jarabo Colomer emphasized the importance of reciprocal trust between the various national legal systems of the EU Member States.\(^ {14}\) The English anti-suit injunction seemed to place doubt on this structure of mutual trust. This mutual trust meant that each State recognized the capacity of the other legal systems to contribute to the objectives of integration. No superior control authorities had been appointed, except for the European Court of Justice. He added that 'still less has authority been given to the authorities of a particular State to arrogate to themselves the power to resolve the difficulties which the European initiative itself seeks to deal with'.\(^ {15}\) States should not be allowed to influence the jurisdiction of other Member

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\(^{12}\) Ibid at 15–16.

\(^{13}\) Ibid at 20.


\(^{15}\) Ibid para 31.
States, even if the influence would be only indirect. Furthermore, only legal systems of the common law tradition knew this mechanism and allowing the anti-suit injunction would create an imbalance.

Responding to the assertion by the House of Lords that the injunction was given against parties and not against foreign courts, the Advocate-General stated that if a party were prohibited, under threat of penalty, from bringing an action in a foreign court, the result would be the deprivation of the foreign court’s jurisdiction. The firm opinion of the Advocate-General was therefore that the anti-suit injunction in relations with other EU Member States could not be tolerated.

The European Court of Justice, like the Advocate-General, emphasized the mutual trust that should exist between the courts of the EU Member States. This was what enabled the system of jurisdiction and a simplified procedure for the recognition and enforcement of judgments. Prohibiting a party from going to a foreign court interfered with that court’s jurisdiction. That interference was incompatible with the system of the Brussels Convention. The argument that there was no direct interference, since the injunction is directed at the parties and not at the foreign court, did not convince the European Court of Justice. Even an indirect interference would be too much.

The Court did not accept the argument that an anti-suit injunction could help to reach one of the goals of the Convention, namely to reduce irreconcilable judgments. The Convention had its own rules to deal with that situation, also called lis alibi pendens (Article 27). The anti-suit injunction did not fit in with the rest of the Convention: there were no rules for the situation where a foreign court gave a judgment despite an injunction and there were no rules to regulate the existence of contradictory injunctions.

F. Assessment

This judgment has provided a long-awaited response. But it has also disappointed by the simplicity with which the European Court of Justice has seen the problem. If so many of us wondered about this for so long, surely there was more to it. There must have been more to consider.

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16 [2004] 1 Lloyd’s Rep 216 at para 34.
17 Ibid para 38.
1. The Practice of the English Courts

The Court of Appeal gave a much-discussed judgment\(^{19}\) in 1993, *Continental Bank NA v Aeakos Compania Naviera and Others*,\(^{20}\) granting the requested anti-suit injunction to restrain proceedings in Greece in contravention of a choice of court clause in favour of the English courts. In that case, as in the one under discussion, the Court considered the Brussels Convention solution of *lis pendens* inapplicable.\(^{21}\) In *OT Africa Line Ltd v Hijazy and Others*,\(^{22}\) on similar facts, an anti-suit injunction was granted regarding proceedings in Antwerp (Belgium). The European Court of Justice has now overturned this practice; the English courts can no longer grant anti-suit injunctions in cases that fall within the scope of application of the Brussels I Regulation and where the other court belongs to another EU Member State.

2. Comity and Mutual Trust

The defenders of the anti-suit injunction state that it does not interfere with the sovereignty of the foreign court. However, Hartley points out that that is a false argument.\(^{23}\) In practice, a court can only exercise its sovereignty (at least in civil matters) if procedures are initiated by the parties. By prohibiting parties from doing so, the sovereignty and independence of the foreign court is necessarily affected. This point was also made by the *Oberlandesgericht* (Regional Court of Appeal) in Düsseldorf\(^{24}\) concerning the enforcement of an English anti-suit injunction: the Court refused to recognize the injunction, stating that it interfered with the sovereignty of the German courts by preventing it from fulfilling its tasks since parties had been prohibited to take steps in the proceedings.

Mutual trust goes further than comity: it is the implication that the Member States of the European Union not only have respect, but also blind trust in each other’s courts.

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\(^{20}\) *Continental Bank NA v Aeakos Compania Naviera SA and Others* [1994] 1 WLR 577. In the subsequent case, *The Eras EIL Actions* [1995] 1 Lloyd’s Rep 64, at 78–9, the Queen’s Bench Division refused to grant an anti-suit injunction, but admitted that the Brussels Convention did not prohibit it to grant such injunction if the conditions were satisfied.

\(^{21}\) The Court of Appeal found that the provision on jurisdiction clauses took precedence over the provision on *lis pendens*. Since Case C-116/02, *Gasser GmbH v Misat Srl*, judgment of 9 Dec 2003, [2004] 1 Lloyd’s Rep 222 at 229–30 (not yet published in the ECR), we know, however, that that interpretation by the Court of Appeal was not correct; even if the parties concluded a choice of court agreement, the strict priority rule must be observed.

\(^{22}\) [2001] 1 Lloyd’s Rep 76.

\(^{23}\) TC Hartley, n 10 above at 506.

\(^{24}\) In its judgment of 10 Jan 1996, [1997] IL Pr 320.
A recent example of that mutual trust could be seen in the judgment of the European Court of Justice in Gasser,25 where the court refused to take into account the argument that the judicial systems of some Member States function slower than those of others, since it was said that the Member States have to trust each other’s legal systems.26 That argument was also decisive in the case under discussion. The point here is not that the anti-suit injunction in itself breaks the rules of the Brussels Convention, but that the value underlying it fundamentally opposes that of the European judicial space.27 How can, in this sisterly union, one court think itself superior to the extent of telling another court what its job is?

This crucial argument of mutual trust has overshadowed any argument that could be brought in favour of anti-suit injunctions. They can help to fill a gap in the Convention without negating its existence. The present case might fall in the gap in the absence of an anti-suit injunction. It does not completely fall within the scope of the lis pendens rule,28 as will be indicated below. The provision on related actions29 might be relevant, but that Article merely gives discretion to the judge to join two actions and it is up to him to decide whether they are related. At the same time, it was clear to the English judges that the proceedings in Spain had been brought with the sole purpose of vexing Mr Turner. Changepoint, the plaintiff in Spain, was not the employer of Mr Turner and the amount of damages it claimed was beyond all reasonable proportion, if indeed it had suffered any damage in the first place. If the anti-suit injunction could not be issued and the Spanish judge decided that the proceedings were not adequately related, Mr Turner would have no protection and would be vexed and harassed by the Spanish proceedings. Anti-suit injunctions protect English proceedings, but not necessarily only English litigants. Any litigant would be eligible for the protection.30

3. Lis pendens

The strict rule of lis pendens cannot resolve all problems. Only in cases where the parties are identical can one rely on it. This was explained in The Tatry:31 one party was involved only in the proceedings in Rotterdam (Netherlands) and not in London, where all the others were involved as well. The Court of Justice found that the rule on lis pendens could only apply to the extent that the parties were identical. That would of course mean that both actions could continue. The correct way to solve that problem would be by way of the rule on related actions, although that rule placed no obligation on the courts, but only created the possibility to allow the combining of the actions. The lis pendens rule has since been slightly liberated in the Drouot case,32 where the Court of Justice admitted that an insurer and the insured parties could be regarded as the same

26 Rec 72 of judgment.
27 See Hartley, n 19 above at 166 and 168.
28 Art 27 Brussels I Regulation; Art 21 Brussels Convention.
29 Art 28 Brussels I Regulation; Art 22 Brussels Convention.
30 Briggs and Rees, n 19 above at 365.
parties if their interests were identical and inextricable. For the *lis pendens* rule to apply, the two causes of action must be the same. The Court of Justice has acknowledged that the claimant in the one action may be the defendant in the other.\(^{33}\) That leaves the question as to the applicability of the *lis pendens* rule to the present case. First, would the courts have viewed the parties as the same? The plaintiff in London was Mr Turner, while the defendant was Harada. The proceedings in Madrid were brought by Changepoint against Mr Turner. Therefore, strictly speaking, the *lis pendens* rule would not apply since the parties were not identical. However, both Harada and Changepoint belonged to the same group, which might have been an argument in favour of a more liberal application of the *lis pendens* rule. If the *lis pendens* rule were not applicable here, the only possible solution would be the application of the rule on related actions, bearing in mind that that rests on a discretion exercised by the judges.

The identical nature of the causes of action was not beyond doubt. The English proceedings concerned wrongful dismissal while the Spanish proceedings related to damages for unprofessional conduct. It was not clear to the English Court of Appeal that the plaintiff in the Spanish actions was even the true employer of Mr Turner.\(^{34}\) That moves the causes of action of the two matters even further apart.

The rule is a strict temporal one and does not always ensure the most just outcome.\(^{35}\) However, that is probably a shortcoming to which the European Union Member States have grown accustomed. The anti-suit injunction, on the other hand, is flexible in that it takes the more natural forum into account while the strict priority and race to the court do not exist.\(^{36}\) Another advantage of the anti-suit injunction is that it can be granted before actions are initiated. One need not have two pending cases before a solution can be sought.


The European Court of Justice has found on several occasions that the purpose of the Brussels Convention is not to unify procedural rules of the EU Member States. It only establishes common rules of jurisdiction and facilitates the recognition and enforcement of judgments.\(^{37}\) The Court stated that national rules of procedure could not impair

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\(^{33}\) Case C-406/92, *The Owners of the cargo lately laden on board the ship 'Tatry' v The Owners of the ship 'Maciej Ratay*', [1994] ECR I-5439, Rec 31.

\(^{34}\) Ibid at 632.


\(^{36}\) See D McClean, n 18 above at 126 et seq. See also A Briggs and P Rees, n 19 above at 217, stating that the Brussels I Regulation provides a high degree of uniformity, but a low degree of discretion.

the functioning of the Convention.\textsuperscript{38} This last statement was, however, \textit{obiter}: it was observed by the Court without being relevant for the particular case. The Court did not give an example. The anti-suit injunction might then be such a procedural rule that is not a rule of jurisdiction and that may in principle be applied in conjunction with the Convention if it did not impair the Convention. However, the anti-suit injunction does impair the Convention in that it does not fully respect its rules. Therefore it is ruled out. On the other hand, the rules on anti-suit injunctions and \textit{forum non conveniens} are hybrid. They are rules of procedure, but they have such a fundamental impact on jurisdiction that it seems hard to distinguish them. In this sense they differ from purely procedural rules like time limits or the order of pleadings.

5. A Limited Question

The House of Lords formulated their question to the European Court of Justice carefully. The question related only to anti-suit injunctions when the other court was situated in an EU Member State. Nothing was discussed in relation to third States.

The question of whether an English court can grant an anti-suit injunction restraining the parties from commencing or continuing actions in third State courts, remains open. Jurisdiction may be based on the Brussels Convention/Regulation, eg because the defendant is resident in England while the plaintiff is resident in Canada. At the same time, a Canadian court might have jurisdiction according to its national rules. Can an English court issue an anti-suit injunction to keep the litigants out of the Canadian court? According to purely internal English law, this would be possible since the English courts have \textit{in personam} jurisdiction. This injunction would protect the Brussels Convention/Regulation. It would ensure compliance with its rules on jurisdiction. Furthermore, it would prevent contradictory judgments, which would facilitate automatic recognition within the EU: a court can refuse recognition if there is an earlier irreconcilable judgment from a third State, involving the same parties and the same cause of action, which can be recognized in that State.\textsuperscript{39} An anti-suit injunction could help prevent the occurrence of irreconcilable judgments. The argument that there should be mutual trust between the Member States is not relevant in this case. The fact that an English court restrains a party from bringing proceedings in a third State court has no bearing on the functioning of the European Union’s judicial sphere.

Another case would be where a third State court is involved while jurisdiction is based on a rule of English domestic law, permitted by Article 4 of the Brussels I Regulation. Such will be the case if the defendant is domiciled in a third State. In this case the anti-suit injunction would have the same effect as described above. No mutual trust would be put in question.

Let us suppose that the parties conclude a non-exclusive choice of court agreement. One of the elected courts is the High Court in London and the other is a court in Australia.\textsuperscript{40} If at least one of the parties is domiciled in the EU, the case may fall within


\textsuperscript{39} Art 34(4) Brussels I Regulation.

\textsuperscript{40} Compare the agreement concluded between the parties in \textit{Continental Bank NA v Aeakos Compania Niviera SA and others} [1994] 1 WLR 588: the borrowers had to bring proceedings in England while the bank retained the right to bring proceedings in any country that had jurisdic-
the scope of the Regulation.\textsuperscript{41} The English court might issue an anti-suit injunction restraining the parties from instituting proceedings in Australia. That injunction, as in the examples above, will protect the scheme of the Brussels I Regulation without denying the mutual trust between the EU Member States.

In a more aggressive fashion, the English court might grant an anti-suit injunction despite the existence of a choice of court clause in favour of a third State, because the court is of the opinion that the clause is invalid, or because an exclusive basis of jurisdiction exists for the courts in England.\textsuperscript{42} The injunction, whether tolerable on grounds of comity or not, has nothing to do with the Brussels I Regulation and the European Union judicial network.\textsuperscript{43}

The above-mentioned examples provoke another question: what about an arbitration clause? If the parties have concluded an arbitration agreement, can the English courts prevent the parties from going to arbitration?\textsuperscript{44} Can the Brussels I Regulation protect the arbitration proceedings and prevent such anti-suit injunctions in the European Union? After the \textit{Van Uden} judgment,\textsuperscript{45} the answers to these types of questions have become less clear.\textsuperscript{46}

Another consequence of the precise formulation of the question is that the question on the compatibility of the doctrine of \textit{forum non conveniens} with the Brussels I Regulation has not been touched. The case pending on that matter, \textit{Owusu},\textsuperscript{47} will be

\textsuperscript{41} Art 23 Brussels I Regulation provides for choice of court clauses in favour of courts in the EU between two parties, at least one of which is domiciled in the EU. These clauses are exclusive unless the parties have agreed otherwise. In the example mentioned, the application of the Regulation would in fact depend on the court seized: if it is an EU court, the Regulation will be applied. It is worth noting that the future Hague Convention on exclusive choice of court agreements will not apply if the forum election is not exclusive. For further information on the project of that Convention, see <http://www.hcch.net>.

\textsuperscript{42} There is no clarity as yet on this situation (see Briggs and Rees, n 19 above at 371), but let us assume for argument’s sake that an anti-suit injunction may be granted in this case.


\textsuperscript{46} This case dealt with provisional measures requested before a Dutch court despite the existence of an arbitration clause. The Court of Justice found that these provisional measures fell within the scope of the Brussels Convention and in this sense created confusion as to the extent of the exclusion of arbitration proceedings from the Brussels regime (Art 1(2)(d) Brussels I Regulation; Art 1(4) Brussels Convention).

\textsuperscript{47} Case C-281/02 \textit{Owusu v Jackson and others}, the hearing of which started on 4 May 2004.
assessed separately and this decision does not include anything to foretell the result that the Court should reach in that case.

G. Conclusion

The long-expected judgment in the Turner case is not really surprising. At the same time, the argumentation of the Court and of the Advocate-General was European-based. Emphasis has been placed on the mutual trust that should exist between the EU Member States. In contrast, the English courts have in the past held the opposite view, finding that anti-suit injunctions can have a purpose for which no provision has been made in the Brussels Convention. In this way the injunction has been used to protect choice of forum clauses for English courts where it was thought that the strict rules of the Brussels Convention were insufficient. The anti-suit injunction, like the doctrine of forum non conveniens, is on the borderline between rules of jurisdiction and national rules of procedure. This makes clear conceptualization difficult.

The judgment gave no hint as to the related question, what about anti-suit injunctions when the European judicial space is not harmed? We think of the case where the parties are restrained from third State courts, for instance where there is a basis of exclusive jurisdiction (such as immovable property) in England, or a forum choice in favour of the English courts. As the case law develops, we slowly but surely fill the gaps of our understanding, while much work is left to be done.

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