Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws

Karen D. Breckenridge
JUSTICE BEYOND BORDERS: A COMPARISON OF AUSTRALIAN AND U.S. CHILD-SEX TOURISM LAWS

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"We thought tourism produced beggar children, which it does; but as we came to know them, we realized they were selling their bodies too."– Sudarat Srisang, FACE

Abstract: In 1996, an estimated one million children were sexually exploited in Asia. "Sex tourists" who travel to Asia from developed countries, including Australia and the United States, contribute to the demand for child prostitutes. A decade ago, Australia and the United States passed laws in an attempt to combat child-sex tourism. Over the past decade, the laws of both countries have had limited success. In 2003, the United States enacted the PROTECT Act. The PROTECT Act, nearly identical to Australia’s Crimes (Child Sex Tourism) Amendment Act, allows for the prosecution of child-sex tourists and child-sex tour organizers, based on sexual offenses committed abroad. This Comment compares these U.S. and Australian sex tourism laws and argues that although the PROTECT Act makes the prosecution of U.S. sex tourists easier, the United States should not expect a significant increase in the number of convictions. In particular, prosecutions of sex tourists in the United States under the PROTECT Act will be more limited than under its Australian counterpart because of America’s unique constitutional protection of a criminal defendant’s right of confrontation. Without directing its resources at the organizers of sex tours, and without addressing the roots of the child-sex tourism problem, the United States will fail to protect children.

I. INTRODUCTION

The clandestine billion-dollar sex tourism industry, which victimizes hundreds of thousands of children, is a global human rights problem with devastating consequences. In one horrific case, Michael Lewis Clark, a sixty-nine-year-old U.S. citizen and military veteran, was arrested by Cambodian police in June 2003 for engaging in sexual acts with two

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† The author would like to thank Professors John Junker, Robert Aronson and Peter Nicolas for their guidance and suggestions on this Comment. The author would also like to thank the Pacific Rim Law & Policy Journal staff for their hard work and commitment. Finally, the author is extremely grateful to her family and friends for their support and patience throughout this process.

1 JEREMY SEABROOK, TRAVELS IN THE SKIN TRADE: TOURISM AND THE SEX INDUSTRY 150-51 (2d ed. 2001). The Task Force to Fight Against Child Exploitation (“FACE”) is a non-governmental organization in Thailand focused on preventing the exploitation of South Asian children. Id. at 174.

2 See infra note 36 and accompanying text.

3 See infra note 29 and accompanying text.
After Clark's extradition to the United States in early September, federal prosecutors filed a complaint in Seattle, charging Clark for engaging in illicit sexual conduct in Cambodia. Clark is believed to be the first person to be prosecuted under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"). The PROTECT Act seeks to strengthen laws punishing individuals who travel abroad and sexually exploit children.

Like the United States, Australia must also confront the reality that its own citizens engage in such acts. Robert Marlow, a fifty-five-year-old Australian, pleaded guilty in April 2000 to sexually abusing boys during several business trips to Fiji. The government sentenced Marlow to three years in jail under Australia's Crimes (Child-Sex Tourism) Amendment Act of 1994 ("CST Act").

Clark and Marlow's prosecutions represent two of the disappointingly limited number of successful child-sex tourism convictions. Child-sex tourism is the exploitation of children by individuals who travel to foreign countries to engage in sexual acts with children. A 1996 United Nations report estimated that a total of one million children were sexually exploited in Asia alone.

Unlike Clark and Marlow, however, most sex tourists escape identification and prosecution. Because a large percentage of sex tourists

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10 Crimes (Child Sex Tourism) Amendment Act of 1994, No. 105, Pt. IIA [hereinafter CST Act]. This legislation amended the Crimes Act 1914. Id.
originate in the United States and Australia, both countries adopted laws that permit the prosecution of sex tourists. In 2003, the United States strengthened its existing sex tourism law by adopting the PROTECT Act, designed to prevent Americans from sexually abusing children while traveling abroad.

Un Fortunately, the PROTECT Act is unlikely to achieve the objective of its design. Australia has had limited success in preventing child-sex tourism under nearly identical legislation. Further, the Sixth Amendment to the U.S. Constitution, which guarantees a criminal defendant’s right to confront his accuser, is likely to significantly hinder the U.S. government’s ability to successfully prosecute American child-sex tourists.

This Comment argues that the PROTECT Act will not make a significant impact in combating child-sex tourism. Part II of this Comment discusses the international epidemic of child-sex tourism and briefly addresses the industry’s history, scope, underlying causes, and destructive effects. Part III describes the particularly acute problem of American child-sex tourism, including the history of U.S. child-sex tourism legislation and the recent adoption of the PROTECT Act. Part IV compares U.S. and Australian child-sex tourism laws, and concludes that even with the new PROTECT Act, the United States, like Australia, will likely have limited success in preventing child-sex tourism. Part V suggests that where distinctions exist between U.S. and Australian child-sex tourism laws, the differences are unlikely to lead to greater success for the United States, either because of the nature of sex tourism, or because of America’s unique constitutional protection of a criminal defendant’s right of confrontation. Part VII recommends steps that should be taken to prevent child-sex tourism.

14 Vitit Muntarbhorn, International Perspectives and Child Prostitution in Asia, in FORCED LABOR: THE PROSTITUTION OF CHILDREN SYMPOSIUM PROCEEDINGS 9, 22 (U.S. Dept. of Labor, et al. eds., 1996) [hereinafter International Perspectives]. See also infra Part II.E.
18 See infra Part IV.B.
19 See infra Part V.D.2.
II. CHILD-SEX TOURISM: A GLOBAL PROBLEM WITH DEVASTATING CONSEQUENCES

An extraordinary number of children are sexually exploited worldwide as a result of child-sex tourism. The origins of child-sex tourism are varied, and child-sex tourists have wide-ranging motivations. As a result of sex tourism, child victims suffer devastating physical and psychological harm.

A. Asia's Burgeoning Child-Sex Tourism Claims an Extraordinary Number of Child Victims

According to the United Nations Office on Drugs and Crime, the most common type of exploitation faced by trafficking victims is sexual exploitation. Southeast Asia has a significant role in the child trafficking and child sexual exploitation industries, accounting for approximately one-third of the worldwide trade in both women and children. This enormous trade in children undoubtedly helps to fuel the burgeoning sex industry, as many of these child trafficking victims are forced to work in prostitution or pornography. It is not surprising, therefore, that Southeast Asia has the highest number of child prostitutes in the world.

One of the most devastating forms of sexual exploitation in Southeast Asia is sex tourism. End Child Prostitution in Asian Tourism ("ECPAT"), a leading non-governmental organization ("NGO") in the fight against child sexual exploitation, defines "child-sex tourism" as "the commercial sexual..."
exploitation of children by persons who travel from their own country to another usually less-developed country to engage in sexual acts with children.\textsuperscript{26} Sex tourism is now so prevalent that a definition, albeit somewhat misleading, can even be found in the Oxford dictionary.\textsuperscript{27}

Child-sex tourism contributes to the victimization of a staggering number of children. Although specifying the exact number of children involved in sex tourism is difficult,\textsuperscript{28} ECPAT estimates that nearly one million children were involved in Asia's sex trade in 1994, with 200,000 to 300,000 in Thailand, 100,000 in the Philippines, 100,000 in Taiwan, and 40,000 in Vietnam.\textsuperscript{29} Recent reports confirm that these numbers continue to rise throughout Asia.\textsuperscript{30} For example, over the past three years, Thailand has seen a twenty percent increase in its number of child prostitutes.\textsuperscript{31}

**B. Child-Sex Tourism: Origins and Causes**

Many different factors have contributed to the development and growth of child-sex tourism. Foreign investment, in the form of military installations and economic development, has been a significant factor in the growth of Southeast Asia's child-sex tourism.\textsuperscript{32} For example, the industry grew rapidly in the late 1960s during the Vietnam War.\textsuperscript{33} Brothels and bars, often staffed with underage prostitutes, emerged in large numbers after thousands of U.S. servicemen were stationed in Thailand, the Philippines, and Taiwan.\textsuperscript{34} Today, foreign investment in Southeast Asia, spurred by

\textsuperscript{26} ECPAT FAQ, supra note 11. This Comment focuses particularly on sex tourism involving children, but it should be noted that children are not the only exploited class in sex tourism, nor are they even the majority. This Comment does not address adult prostitution and sex tourism.

\textsuperscript{27} Jonathan Todres, Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally, 9 B.U. PUB. INT. L.J. 1, 2 (1999) (noting that the Oxford Dictionary definition, "the organisation of holidays with the purpose of taking advantage of the lack of restrictions imposed on sexual activity and prostitution in some foreign countries," is misleading as prostitution is illegal in many of the destination countries for sex tourists).

\textsuperscript{28} ECPAT FAQ, supra note 11, at "How Many Children are Victims" page. According to ECPAT, child prostitution research has tended to focus on the most obvious forms, such as children visible in the streets or in brothels. \textit{Id.} However, because the activities associated with the industry are by nature secretive, the numbers given in various reports can only be estimates. \textit{Id.}


\textsuperscript{31} Human Trafficking, supra note 22.

\textsuperscript{32} ECPAT FAQ, supra note 11, at "Child Prostitution" page.

\textsuperscript{33} AMY H.L. SHEE, LEGAL PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION IN TAIWAN 38 (1998).

\textsuperscript{34} RON O'GRADY, THE CHILD AND THE TOURIST 92, 95, 101-02 (ECPAT Thailand, 1992). In the Philippines, child prostitution numbers rose in the 1970s and 1980s when the U.S. Navy established a presence at Olongapo Bay. ECPAT FAQ, supra note 11, at "Child Prostitution" page.
recent economic development policies, attracts an increasing number of foreign tourists to the region.\textsuperscript{35} As a result of Southeast Asia’s economic growth in the past four decades, prostitution has become a billion dollar industry.\textsuperscript{36} As of 1998, an estimated two to fourteen percent of the individual gross domestic product of Indonesia, Malaysia, the Philippines, and Thailand is attributable to sex tourism.\textsuperscript{37} The allure of tourist dollars likely prevents host countries from proactively pursuing child-sex tourists. As one city councilman in Angeles, Philippines stated, “We hate the fact that our survival depends on these young girls, but we cannot do anything. It’s an economic reality.”\textsuperscript{38}

Poverty is the primary force that drives hundreds of thousands of children into sex tourism.\textsuperscript{39} Poverty-stricken families may sell a child into prostitution,\textsuperscript{40} sometimes mistakenly believing that the child is actually bound for another, more desirable job.\textsuperscript{41} In such cases, the family may receive cash immediately.\textsuperscript{42} In exchange, the child is personally responsible for paying off the debt with his or her labor.\textsuperscript{43} Such debts are nearly impossible to repay through prostitution and the child is typically forced to stay in the industry for many years.\textsuperscript{44} In other cases, children willingly turn

\begin{footnotes}
\item[35] ECPAT FAQ, supra note 11, at “Child Prostitution” page.
\item[36] Some reports indicate that Thai prostitution alone generates US$ 1.8 to 2.2 billion per year. Kim Gooi, Thailand’s Sex Industry Booms with the Economy, DEUTSCHE PRESSE-AGENTUR, Dec. 18, 1996. Other reports estimate the number to be as high as US$ 20 billion per year. Asian Children Facing Threat of Trafficking and Sexual Abuse, AGENCE FR.-PRESSE, Apr. 18, 1997, available at 1997 WL 2098507 (last visited Mar. 8, 2004).
\item[37] See Todres, supra note 27, at 3.
\item[38] Wallace, supra note 29.
\item[39] International Perspectives, supra note 14, at 10.
\item[40] Id. One survey of nine villages in Thailand found that 63% of the girls under age 16 who were delivered to the brothel were brought there by their parents, 16% were brought by agents, and 21% by neighbors or friends. Sudarat S. Srisang, Tourism and Child Prostitution in Thailand, in CAUGHT IN MODERN SLAVERY: TOURISM AND CHILD PROSTITUTION IN ASIA 37, 41 (1991).
\item[41] Child Prostitution, supra note 30, at 174.
\item[42] Id at 181. In some situations, agents pay parents a “loan” for the child when the child is nine or ten. Id. When the girl is twelve or thirteen years old, the remainder of the loan is paid to the parents, usually around US$ 800 to US$ 1600, and the daughter must leave with the agent to work off the payment. Id.
\item[43] Id. The girls usually have no idea what the total amount of their debt is, nor the terms for repayment. Id.
\item[44] Id. See also William Branigin, Children for Sale in Thailand; Poverty, Greed Force Girls into Prostitution, WASH. POST, Dec. 28, 1993, at A1 (observing that in order to pay off the loans, the children may be required to engage in sexual acts with as many as thirteen men each night). Repaying the debt is made more difficult by the fact that a girl’s “price” often decreases the longer she is there. Id. In one account, a Burmese girl deceived into working in a Thai brothel was informed upon arrival that she had a US$ 800 debt. SEABROOK, supra note 25, at 161. Only half of what was paid by customers contributed to paying off the debt, and with other expenses her debt increased. Id. She was finally released when the brothel was raided after NGO involvement. Id.
\end{footnotes}
to prostitution in an effort to support their families, or, at the other extreme, to escape from an abusive domestic situation. Whether by sale, deception, or voluntary participation, poverty plays a key role in driving children to sex tourism.

In addition to poverty, commentators offer many other motives that may cause children to enter the sex trade. Some of the more commonly identified causes include psychological or physical abuse in the family; children orphaned by war or AIDS; a desire to obtain material wealth, and gender and ethnic discrimination. Whatever the impetus, many children fall prey to the industry and will eventually come into contact with the industry's primary offender, the child-sex tourist.

C. The Varied Backgrounds and Motivations of Child-Sex Tourists

There is no single profile of the child-sex tourist. Child-sex tourists come from all areas of the world. While the majority is male, they span all social classes and occupations, from academics to members of the

45 Branigin, supra note 44.
46 Child Prostitution, supra note 30, at 181.
47 International Perspectives, supra note 14, at 10.
48 ECPAT FAQ, supra note 11, at “What Makes Children Vulnerable” page. It is estimated that 80% of the children in the commercial sex industry were victims of psychological or physical abuse in their families. Id.
49 Id. Children are frequently separated from their parents or orphaned in times of war and conflict, and child advocates estimate that Asia will surpass Africa in numbers of persons infected with HIV and AIDS. Id.
50 Id. The lure of earning money quickly attracts middle-class families and children to the sex trade. For example, the number of Fijian children prostituting themselves to earn money increases at Christmas time. Id.
52 ECPAT FAQ, supra note 11, at “What Makes Children Vulnerable” page. A recent study in Northern Thailand determined that “hilltribe” youth were most susceptible to entering the sex trade. Id. hilltribe people are denied Thai citizenship, which presents barriers to their education and employment opportunities. Id.
53 ECPAT FAQ, supra note 11, at “Who Sexually Exploits Children” page.
54 SEABROOK, supra note 25, at 39. It is important to note that not all sex tourists exploiting children are foreigners. Branigin, supra note 44. Remarkably, domestic demand is higher than foreign demand. Id. However, the power of the foreigner over the child is much greater than that of the local exploiter, and the ability to prosecute the foreigner is much weaker. ECPAT FAQ, supra note 11, at “Child Prostitution” page.
55 ECPAT FAQ, supra note 11, at “Who Sexually Exploits Children” page.
military. Sex tourists may travel individually or they may come with organized groups, including commercially organized sex tours. Child-sex tourists can, however, be divided into at least two categories. “Preferential” sex tourists have a definite sexual preference for children and initiate travel with the intent to service those desires. In contrast, “situational” sex tourists seize the opportunity to engage in illegal sexual activity with children without any preconceived intent to do so.

Child-sex tourists are attracted to Southeast Asia for a variety of reasons. Some are attracted by the cheap price of a prostitute, which may be as little as two dollars in some instances. Others are attracted by the region’s relative anonymity, which is facilitated by ineffective local law enforcement that allows them to visit various locales virtually undetected. Still others are attracted to a stereotype of Asian women as being more nurturing, sexually desirable, or passive than Western women.

D. Child Victims Often Suffer Irreparable Harm

Sex tourism has devastating, lifelong physical and psychological effects on child victims. Children involved in sex tourism are often physically beaten and experience other bodily harm in the hands of their pimps, traffickers, or customers. Child victims are also at an increased risk of contracting sexually transmitted diseases. One Cambodian NGO reported that approximately seventy percent of the girls rescued from

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56 SEABROOK, supra note 25, at 39.
58 ECPAT FAQ, supra note 11, at “Who Sexually Exploits Children” page.
59 Id.
60 Child Prostitution, supra note 30, at 179.
62 ECPAT FAQ, supra note 11, at “Who Sexually Exploits Children” page.
64 Economic and Social Bases, supra note 51, at 12. Exotica Travel.com, a travel company providing “exotic travel experience,” describes Thai women as “known throughout the world, black fine shimmering hair, their firm bodies are made for love, coupled with their warm and friendly personalities.” Advertisement, EXOTICA TRAVEL.COM, available at http://www.exoticatravel.com/destination.php (last visited Feb. 24, 2004). The travel company suggests that “Men come from every corner of the world to sample the sweet, attractive, demure, [sic] of these beautiful young girls.” Id.
65 ECPAT FAQ, supra note 11, at “What are the Impacts on Children” page.
66 Id.
brothels were infected with HIV. In addition to the physical effects of child-sex tourism, the psychological damage is immeasurable. Many children suffer from depression, low self-esteem, and feelings of shame or guilt. Child prostitution “robs a child of his or her dignity... A child in that situation can never look at an adult, at a fellow human being, in the same way. Those scars will last forever.” These devastating consequences are often caused by sex tourists from wealthy, developed countries, including the United States and Australia.

E. Child-Sex Tourism Originating in the United States and Australia is Prevalent

Although estimating the total number of child-sex tourists traveling to Asia is difficult given the underground nature of the activity, reform advocates suggest that a large percentage are from the United States and Australia. The Australian Human Rights and Equal Opportunity Commission estimates that over 250,000 sex tourists visit Asia every year, with twenty-five percent coming from the United States and thirteen percent from Australia. U.S. Congresswoman Zoe Lofgren, testifying to the House Committee on the Judiciary, stated that American child-sex tourism is a “large issue.” According to Lofgren, other House Members, while visiting Asian countries, observed American men “preying on small children.” Along the same lines, the Australian Minister of Justice described Australian tourists as “significant sexual abusers of children overseas, particularly in Asia.” In an effort to combat this widespread industry, fueled in large part

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67 Id. The United Nation’s Children’s Fund (“UNICEF”) described the exposure of children to HIV and AIDS as the “most frightening consequence of child prostitution.” Hodgson, supra note 13, at 521.

68 ECPAT FAQ, supra note 11, at “What are the Impacts on Children” page.

69 Id.


71 International Perspectives, supra note 14, at 22.


73 Id. See also Kennedy, supra note 70, at 4 (specifying that the twenty-five percent estimate for American child-sex tourists represents U.S. businessmen or military personnel).


75 Id.

76 Hodgson, supra note 13, at 516. In 2000, the Australian Federal Police were reportedly tracking 400 suspected sex tourists who were known to travel in the Pacific Rim with great frequency. Francis Whiting, Monsters in Paradise, SUNDAY MAIL (Queensland, Austl.), Oct. 29, 2000, at 90 [hereinafter Monsters in Paradise]. Unofficially, advocates were told that this figure was actually significantly higher.
by their citizens, Australia and the United States have each enacted legislation providing for prosecution of child-sex tourists.

III. PASSAGE OF THE PROTECT ACT IS A SIGNIFICANT STEP FORWARD AFTER A DECADE OF INEFFECTIVE LEGISLATION

Despite increased efforts by the United States to curb child-sex tourism over the past decade, attempts to apprehend and prosecute child-sex tourists have been largely ineffective. The United States first adopted a child-sex tourism law in 1994, yet in the ensuing decade, the federal government successfully convicted only two individuals under this legislation. In an attempt to strengthen existing sex tourism legislation, Congress passed the PROTECT Act, which expands the bases on which the U.S. government can prosecute individuals and organizations involved in sex tourism.

A. History of U.S. Sex Tourism Legislation: A Decade of Futility

The first U.S. attempt to combat sex tourism occurred when then President Clinton signed the Child Sexual Abuse Prevention Act of 1994 ("1994 Act") into law. The 1994 Act made it a crime for any U.S. citizen or permanent resident to travel to a foreign country with the purpose of engaging in a sexual act with a person under the age of eighteen. Convictions under the 1994 Act carried a maximum ten-year prison sentence per count.

The 1994 Act was described as "a powerful blow against the growing international child-sex trade." Under the 1994 Act, sex tourists could be

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78 See infra Part III.A.
80 Child Sexual Abuse Prevention Act § 160001(g). The Child Sexual Abuse Prevention Act was included in the Violent Crime Control and Law Enforcement Act of 1994. Id. This Act was an extension of the Mann Act of 1910. White-Slave Traffic (Mann) Act, 61 Pub. L. 277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. 2421-2424 (1994)). The Mann Act was first passed to prevent interstate transport of women for sexual purposes. Id. In 1986, the Mann Act was amended to criminalize the interstate or international transport of any person under age eighteen with the intent that the minor engage in sexual activity. 18 U.S.C. § 2423(b).
convicted for their sexual acts abroad, as long as there was evidence of the tourist's intent before leaving the United States. In addition, the 1994 Act contained no double criminality requirement. Thus, even if the sexual act was legal in the foreign country, the sex tourist could still be prosecuted domestically.

The 1994 Act, however, did not result in the powerful blow against sex tourists that legislators envisioned. Over the past decade, the government has convicted only two U.S. citizens under the 1994 Act. Because of the unexpectedly low number of convictions under the 1994 Act, legislators subsequently sought to expand its scope.

B. The PROTECT Act of 2003 Expands the Reach of the Law

After failing to convict even a handful of child-sex tourists under the 1994 Act, U.S. lawmakers made another legislative attempt to curb child-sex tourism by adopting the PROTECT Act in 2003. U.S. Representatives originally proposed the child-sex tourism provisions of the PROTECT Act as separate legislation in 2002. At that time, the House Committee on the Judiciary reported that the amendments would "close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution." The sex tourism provisions were eventually incorporated

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84 § 16001(g), 108 Stat. 2037 (1994).
85 Id.
86 Id.
87 See Hodgson, supra note 13, at 530. See also Crime Bill, supra note 83, at 19.
88 The first conviction involved Marvin Hersh, a college professor, who traveled to multiple third world countries, including Honduras and Thailand, where he offered poverty-stricken boys small amounts of money, clothing or gifts in exchange for sexual acts. United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002). Hersh was convicted on multiple counts including conspiracy to travel with intent to engage in sexual acts, as well as making false statements to the government, harboring an alien, and possession of child pornography. Id. Hersh was sentenced to 105 years in prison. Id. The second conviction involved Nicholas Bredimus, a business owner. United States v. Bredimus, 234 F.Supp.2d 639 (N.D. Tex. 2002) (rejecting Bredimus' argument that the statutes as applied to him were unconstitutional and denying Bredimus' motion to dismiss). Bredimus admitted that while in Thailand for business meetings he also intended to make videotapes of Thai children engaged in sexually explicit conduct. Press Release, U.S. Department of Justice, Coppell Businessman Sentenced following Guilty Plea to Foreign Travel to Commit Sexual Abuse of Children (Nov. 18, 2002), available at http://www.usdoj.gov/usao/txn/PressRel02/bredimus_sen_pr.html. (last visited Nov. 9, 2003). Bredimus hired a Thai woman to interpret for him and assist him in finding children. Id. He also admitted to engaging in illegal sexual acts with a 13-year-old Thai boy. Id. Bredimus was convicted in 2002 and sentenced to 66 months in prison and a US$ 30,000 fine. Id.
91 Id.
into the PROTECT Act and signed into law by President George W. Bush on April 30, 2003.92

While preserving the ability to prosecute based on an individual’s intent,93 the PROTECT Act expands the 1994 Act by criminalizing two additional categories of sex tourism. First, the PROTECT Act enables the prosecution of a person who engages in “illicit sexual conduct in foreign places.”94 Requirements under this section are merely that the person “travel in foreign commerce”95 and engage in “illicit conduct.”96 Unlike the 1994 Act, there is no requirement that the defendant intend to commit the act before or upon leaving the United States,97 a feature that may have constitutional implications.98

Second, the PROTECT Act subjects operators of sex tours to criminal prosecution.99 The PROTECT Act provides for the prosecution of any individual who, for “commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel” for others to engage in sexual conduct with minors.100 Prosecutors must prove that the organizer.

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93 18 U.S.C. § 2423(b) (2003). As before, the individual must have travelled “for the purpose” of engaging in sexual acts with minors. Id.

94 Id. § 2423(c). “Illicit sexual conduct” is defined as: “(1) a sexual act...with a person under 18 years of age...; or (2) any commercial sex act...with a person under 18 years of age.” Id. § 2423(f).

95 It is not clear from the statutory text or the legislative history how the travel must relate temporally to the conduct. For example, it is unclear whether an expatriate living in a foreign country for years could be convicted under the PROTECT Act for illicit sexual conduct in the foreign country.

96 18 U.S.C. § 2423(c).

97 Id.

98 The ability of the United States to prosecute individuals based solely on their acts committed abroad raises constitutional questions regarding the scope of congressional authority to police behavior extraterritorially. A U.S. court upheld the constitutionality of the 1994 Act. See United States v. Bredimus, 234 F.Supp.2d 639 (N.D. Tex. 2002) (holding that the 1994 Act prohibiting travel with an intent to engage in sexual acts with children did not exceed Congress’s authority under the Commerce Clause). However, the PROTECT Act expands the ability of the government to police behavior abroad, and the courts will likely be asked to examine this question again. This Comment does not address the potential constitutional questions raised by the PROTECT Act.


100 Id. The terms “arranges, induces, procures,” and “facilitates” are not defined in the statute. The clear-cut case under this section would be a sex tour travel agency that markets child-sex tours. However, read broadly, the language may also lend itself to many other situations. Prior to the adoption of the PROTECT Act, the House Committee on the Judiciary specifically noted the “more than 100 web sites devoted to promoting teenage commercial sex in Asia alone.” H.R. REP. NO. 107-525 (2002) (Background and Need for the Legislation). Numerous Internet chat rooms are dedicated to "how-to" instructions for where to go and what to see as a sex tourist. Ryan Bishop & Lillian S. Robinson, Travellers' Tails: Sex Diaries of Tourists Returning from Thailand, in TRANSNATIONAL PROSTITUTION: CHANGING GLOBAL PATTERNS, 13, 13-14 (Susanne Thorbek & Bandana Pattanaik eds., 2002). A chat room host, encouraging specific suggestions for how to be a child-sex tourist, and benefiting financially by traffic to the site, is
had knowledge of the tourist's illicit purpose. Attempting or conspiring to organize or facilitate child-sex tourism or to engage in prohibited sexual activity outside the United States is punishable to the same extent as completed offenses.

The PROTECT Act also significantly increases the maximum sentence previously allowed under the 1994 Act. Violators may now be imprisoned for up to thirty years per sexual act. Accordingly, the U.S. Department of Justice claimed that the PROTECT Act "strengthens laws punishing offenders who travel abroad to prey on children." While it is too early to be certain about the PROTECT Act's overall success, several recent arrests of alleged child-sex tourists may bolster this claim.

I. Recent Arrests of Individuals Under the PROTECT Act Are Encouraging

Since its adoption in April 2003, prosecutors have invoked the child-sex tourism prong of the PROTECT Act on several occasions. In September 2003, prosecutors charged a sixty-nine-year-old man in Seattle, Washington for allegedly traveling to Cambodia to engage in sexual acts with two Cambodian boys, ages ten and thirteen. Michael Lewis Clark was first arrested in Cambodia in June 2003. Clark was extradited to the United States in early September 2003, where he was arrested. Investigators learned that Clark spent a significant amount of time in Phnom Penh over the past five years, sexually exploiting boys between the ages of ten and eighteen. It is estimated that Clark may have molested as many as fifty

arguably "facilitating" the travel of another and could possibly be subject to prosecution under the PROTECT Act.

102 Id. § 2423(e).
104 18 U.S.C. § 2423(b)-(d).
105 PROTECT Act Fact Sheet, supra note 7.
106 See infra Part III.B.1.
107 Carter, supra note 4. The ability to prosecute extraterritorially also raises jurisdictional questions. Under the 1994 Act, courts required that there be evidence of the sex tourist's intent prior to leaving the United States to establish subject matter jurisdiction. See United States v. Bredimus, 234 F.Supp.2d 639, 646 (N.D. Tex. 2002). Prosecutors seeking to convict individuals under the PROTECT Act based solely on actions outside the United States will need to establish the source of jurisdiction. This Comment does not address the potential jurisdictional issues that arise under the PROTECT Act.
108 Carter, supra note 4.
109 Id.
110 U.S. Immigration and Customs Enforcement, supra note 5.
According to the U.S. Attorney’s Office in Seattle, Clark was “believed to be” the first person charged under the sex tourism provisions of the PROTECT Act.\(^\text{112}\)

In October 2003, federal prosecutors in Los Angeles, California charged eighty-five-year-old John Seljan with attempted travel with intent to engage in illicit sexual conduct with minors, the second indictment under the PROTECT Act.\(^\text{113}\) Seljan was apparently preparing to travel to the Philippines to sexually exploit two young girls, ages nine and twelve.\(^\text{114}\) He was arrested at the Los Angeles International Airport after customs officials discovered his luggage filled with “pornographic materials—some apparently involving children—sex aids, 100 pounds of chocolate and candy and thousands of dollars in U.S. and Philippine currency.”\(^\text{115}\) Officials first suspected Seljan after a routine inspection of overseas mail revealed correspondence from Seljan suggesting his intent to engage in sexual acts with the two girls.\(^\text{116}\)

The third indictment under the PROTECT Act occurred on November 20, 2003.\(^\text{117}\) Gary Evans Jackson, a fifty-six-year-old man from Bainbridge Island, Washington, allegedly met three boys in Phnom Phen, Cambodia, and paid them US$ 20 for sexual acts.\(^\text{118}\) All three boys were under the age of sixteen.\(^\text{119}\) Jackson allegedly took digital photos of his activities with the boys, some of which he loaded onto computers at a Phnom Phen internet café, which sparked an investigation of the café by a U.S. government agent, leading to Jackson’s arrest.\(^\text{120}\)

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\(^\text{111}\) See id. (Statistic derived from court documents).
\(^\text{112}\) Id.
\(^\text{115}\) RP-Bound American Charged with “Sex Tourism,” supra note 113.
\(^\text{116}\) 85 Year Old Man Charged, supra note 114.
\(^\text{118}\) Paul Shukovsky, Man is Indicted in Tourism Sex Case, SEATTLE POST-INTELLIGENCER, Nov. 21, 2003, at B2.
\(^\text{119}\) Press Release, United States Attorney’s Office Western District of Washington, Former Bainbridge Island Man Charged Under the PROTECT Act with Traveling to Cambodia and Engaging in Illicit Sex with Minors (Nov. 20, 2003), available at http://www.usdoj.gov/usao/waw/text_version/press_room/2003/1120/jackson.htm (last visited Jan. 5, 2004). The boys were described in one account as “beggar boys”; one of the boys, a 10-year-old, was only 3 feet, 11 inches tall and weighed just 45 pounds. Shukovsky, supra note 118, at B2.
2. Prosecution of Child-Sex Tour-Related Organizations Under the PROTECT Act May Also Be on the Rise

In addition to the initial indictments of individual travelers under the PROTECT Act, prosecutors now have the additional power to charge organizers of sex tours. Prosecutors have yet to utilize this new provision of the PROTECT Act, but a case in New York is potentially the first example.

Feminist organizations have been monitoring a New York travel agency, Big Apple Oriental Tours ("Big Apple") for years, contending that Big Apple organizes tours for men seeking prostitutes, some underage, in Southeast Asia. In 2000, advocates called upon New York prosecutors to file criminal charges against Big Apple. At that time, however, Big Apple's actions were beyond the reach of prosecutors because the 1994 Act only criminalized the acts of individuals and had no provision for sex tour organizers. The state finally turned to a civil remedy under state law. On August 20, 2003, New York Attorney General Eliot Spitzer announced that the state had filed a civil lawsuit against Big Apple. The state successfully sought a temporary order to prevent Big Apple from advertising or promoting its sex tours. The ultimate goal of such litigation is to force the closure of the agency via the imposition of financial penalties.

With the adoption of the PROTECT Act, a civil action is no longer the only option available to New York prosecutors. A spokesperson for Attorney General Spitzer suggested that the state may also file criminal charges in the future. Under the new provisions of the PROTECT Act,

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124 Sex Tours Under Fire, see supra at note 119.
125 Id.
128 Id. The suit "seeks injunctive relief prohibiting [Big Apple operators] from operating an unlawful business, civil penalties, and costs." Id.
129 Id.
130 See Sex Tours Under Fire, supra note 122.
131 Id.
Big Apple could be criminally charged for encouraging or organizing travel designed to enable its clients to engage in illicit sexual conduct. A criminal conviction for organizing sex tours could result in up to thirty years imprisonment for Big Apple's operators.  

The flurry of arrests and indictments following the PROTECT Act's adoption evidences the U.S. government's commitment to the prevention of child-sex tourism, but must nonetheless be viewed cautiously. It remains to be seen whether any convictions will result from these charges. Before U.S. prosecutors herald the PROTECT Act as the ultimate weapon against child-sex tourists and their operators, they should examine Australia's experience under a law very similar to the PROTECT Act. Such examination indicates that the PROTECT Act is unlikely to significantly deter sex tourism.

IV. AUSTRALIA'S CHILD-SEX TOURISM ACT HIGHLIGHTS THE PROTECT ACT'S LIMITATIONS

A. The PROTECT Act Closely Parallels Australia's CST Act

Australia's response to child-sex tourism began with the passage of the CST Act. The CST Act criminalized sexual intercourse or acts of indecency with a child under age sixteen committed outside of Australia by an Australian citizen or resident. Under the CST Act, crimes involving sexual intercourse carry a maximum sentence of seventeen years imprisonment, while crimes involving indecent acts with a child are punishable by up to twelve years imprisonment. Australian prosecutors may also charge organizers of sex tours under the CST Act. The CST Act makes it an offense to benefit from or encourage any conduct that would violate the aforementioned provisions. Some examples of barred activities include "profiting from an arrangement that facilitates an

133 "Sexual intercourse" typically means vaginal or anal penetration, fellatio or cunnilingus. CST Act, No. 105, Pt. IIIA, Div. 1, § 50AC.
134 An "act of indecency" is defined as an act that: "(a) is of a sexual nature; and (b) involves the human body, or bodily actions or functions; and (c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian community." CST Act, No. 105, pt. IIIA, div. 1, § 50AB(1).
135 See id. pt. IIIA, div. 2, §§ 50BA, 50BC.
136 Id. pt. IIIA, div. 2, §§ 50BA, 50BB.
137 Id. pt. IIIA, div. 2, §§ 50BC, 50BD.
138 See id. pt. IIIA, div. 4, §§ 50DA, 50DB.
139 Id.
offense” and “assisting a person to travel outside Australia in order to commit an act that would constitute an offense.” Finally, the CST Act has an additional evidentiary provision allowing for witness testimony by video link in court proceedings for offenses under the Act.

Prior to the PROTECT Act, U.S. and Australian sex tourism laws differed significantly. While the Australian law encompassed acts of individuals committed abroad as well as organizers of sex tours, the U.S. law only allowed a conviction if an individual traveled with the intent to engage in sexual acts with children. This was problematic, given that many situational sex tourists do not embark on travel with specific intent to sexually exploit children, but rather seize the opportunity when it is presented. In addition, proving intent under the 1994 Act required that evidence of the sex tourist’s activities be found in the United States. The clandestine nature of sex tourism and the tourist’s desire for secrecy made gathering such evidence difficult.

With the adoption of the PROTECT Act, the United States amended its sex tourism legislation and broadened its scope to more closely mirror Australia’s CST Act. Both countries now allow for the prosecution of sex tourists based only on evidence of sexual acts abroad. Additionally, both statutes provide for the prosecution of sex tour organizers. Indeed, procedural differences between the U.S. and Australian laws—such as the maximum sentence allowed with a conviction, treatment of double jeopardy, and Australia’s specific accommodation for remote testimony by foreign witnesses—stand out as the remaining material differences.

140 Id. pt. IIIA, div. 4, § 50DA(2).
141 Id. pt. IIIA, div. 4, § 50DB(3)(b).
142 See id. pt. IIIA, div. 5. See infra Part V.D. (discussing Australia’s video link testimony).
144 § 160001(g), 108 Stat. 2037.
145 ECPAT FAQ, supra note 11, at “Who Sexually Exploits Children” page.
146 § 160001(g), 108 Stat. 2037.
149 Compare 18 U.S.C. § 2423(d), with CST Act, No. 105, pt. IIIA, div. 4, § 50DA.
150 The PROTECT Act has a maximum sentence of 30 years imprisonment. 18 U.S.C. § 2423(b)-(d).
151 The CST Act has a maximum sentence of 12 or 17 years, depending on the nature of the sexual act. CST Act, No. 105, pt. IIIA, div. 2, §§ 50BA, 50BB, 50BC, 50BD.
152 CST Act, No. 105, pt. IIIA, div. 6, § 50FC. See infra Part V.B.
153 CST Act, No. 105, pt. IIIA, div. 5. See infra Part V.D. for further discussion of Australia’s video link testimony.
While the PROTECT Act may substantially increase the potential reach of U.S. prosecutors, the United States should be guarded in its optimism. After a decade of enforcement of its sex tourism legislation, Australia has only convicted a small number of sex tourists and operators under the CST Act. Given the similarities between the CST Act and the PROTECT Act and the U.S. and Australian sex tourism industries, it is likely that the U.S. law will have a similarly limited impact on child-sex tourism.

B. Ten Years, Eleven Convictions: The Limited Success of Australia's CST Act

In the ten years since its adoption, Australia has charged only sixteen individuals with violating the CST Act. Of the sixteen individuals charged, eleven were convicted, one case is still pending, and four cases were dismissed. Given the estimated number of sex tourists from Australia, eleven convictions reflect a very low percentage.

Examples of Australian convictions include John Arthur Lee, age forty-three, who was arrested in 1997 and charged with sexually assaulting young girls in Cambodia. Lee’s arrest came after he bragged to colleagues about his sexual activities, even going so far as to showcase photos of the young girls. Lee was convicted in 1999 and sentenced to fourteen years in prison.

Similarly, Robert Marlow, a fifty-five-year-old Melbourne man, pled guilty in 2000 to sexually abusing boys while on business trips to Fiji. Marlow was convicted and sentenced to three years in jail.

In 2001, Jonathan Kaye, a seventy-year-old man from Perth, was charged under the prong of the CST Act that allows for the prosecution of...
individuals who promote or encourage sex tourism. Kaye, a former schoolteacher, advertised his travel services in a local newspaper. While meeting with a customer regarding a tour to Thailand, Kaye offered to arrange services for the man to engage in sex activities with children "of any age," and showed the man photographs of boys under age fifteen who could provide sex. Kaye was convicted in 2003. Kaye's case marked the first time in Australia that a charge for encouraging sex tourism had gone to trial. In addition to the convictions of Lee, Marlow and Kaye, just eight other Australian men have been convicted under the CST Act.

The small number of convictions under the CST Act should be of concern to advocates of the PROTECT Act, given the many similarities between the two laws. If the PROTECT Act is to be more successful than its Australian counterpart, sufficient distinctions must exist between the laws. The limited distinctions between the two laws, however, are unlikely to be the source of greater success for the U.S. prosecutors.

V. DISTINCTIONS BETWEEN THE PROTECT ACT AND THE CST ACT ARE UNLIKELY TO LEAD TO GREATER SUCCESS FOR THE UNITED STATES

In spite of all of the similarities between the PROTECT Act and the Australian CST Act, several distinctions remain. The PROTECT Act allows for prosecutions based upon evidence of intent alone, while the CST Act does not. U.S. sex tourism defendants could be subject to prosecution both abroad and in the United States, while this is barred as double jeopardy under the CST Act in Australia. PROTECT Act supporters might also argue that the low number of Australian sex tourist prosecutions should not reflect poorly on the PROTECT Act, as the PROTECT Act primarily serves

162 Id.
164 See Aussie Mentor Convicted, supra note 155.
165 See Man Faces Court, supra note 163.
166 See Aussie Mentor Convicted, supra note 155.
167 Id. While Kaye's case may have been the first to go to trial, Harry Ernst Ruppert was also arrested for organizing and encouraging adults to have sex with young children. See Child Sex Tourism Charges, supra note 8. Ruppert pled guilty and received a suspended sentence in 1998. Id. One other Australian man was arrested for encouraging child-sex tourism in the Philippines, but the case was dismissed in 1997.
168 See Child Sex Tourism Charges, supra note 8.
170 See infra Part V.B.
as a deterrent to child-sex tourism. Finally, Australia's CST Act explicitly accommodates foreign witnesses via remote video testimony, while the Sixth Amendment to the U.S. Constitution would likely bar this accommodation for foreign witnesses in U.S. sex tourism cases. The distinctions between the PROTECT Act and the CST Act are unlikely to ensure greater success for the PROTECT Act.

A. The Ability to Prosecute Sex Tourists in the United States Based Upon Intent Has Already Proven Ineffective

Advocates of the new PROTECT Act might argue that the U.S. law will have a greater impact than its Australian counterpart because it is broader than the Australian law. While it is true that the PROTECT Act provides for conviction based on evidence of intent alone, a provision that the Australian law does not include, the ability to prosecute based on intent existed in the United States for ten years prior to passage of the PROTECT Act but yielded only two convictions. This particular provision of U.S. sex tourism law has thus already been tested and does not appear to result in a notable increase in the number of convictions.

B. Absence of Foreign Prosecutions Renders Double Jeopardy Irrelevant

Although the United States and Australia differ on whether a child-sex tourism prosecution will be barred by double jeopardy, this too is unlikely to cause an increase in prosecutions. Australia's CST Act specifically forbids child-sex tourism prosecutions if the sex tourist has already been prosecuted for the same act in the foreign country. In the United States, a prosecution under the PROTECT Act would be permitted, even if the defendant had already been prosecuted for the same act in a foreign country. In this respect, the PROTECT Act is again broader than the CST Act. The fact that the bar on double jeopardy would not prevent prosecutions under the PROTECT Act, however, is also unlikely to result in a greater number of convictions.

172 See supra Part III.A.
174 The U.S. Constitution recognizes the notion of double jeopardy. U.S. CONST. amend. V: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Double jeopardy forbids being prosecuted twice for the same offense by the same sovereign. Heath v. Alabama, 474 U.S. 82, 87-88 (1985). However, a prosecution under the PROTECT Act would fall within the "dual sovereignty" exception and would thus be permissible. Heath, 474 U.S. at 88 (holding that when a defendant's single act violates the laws of two sovereigns, the dual sovereignty doctrine recognizes this as two distinct offenses, therefore not within the meaning of the Double Jeopardy Clause of the U.S. Constitution).
convictions for the United States. One of the U.S. Congress’ primary arguments leading to the adoption of the PROTECT Act was the fact that prosecutions simply do not occur in the foreign countries in which the acts actually take place. Thus, both Australia and the United States will likely be prosecuting sex tourists for the first time and notions of double jeopardy are unlikely to distinguish the effectiveness of the two laws.

C. Child-Sex Tourism Laws Have Not Deterred Sex Tourists

PROTECT Act advocates may argue that the law is largely meant to serve as a deterrent, and that actual convictions of individual sex tourists, while an added benefit, are not the true measure of its success. Indeed, neither Australian nor U.S. officials, in framing their respective laws, actually expected that the legislation would yield large numbers of prosecutions. In 1994, in anticipation of the adoption of the CST Act, an aide to the Australian Attorney General stated, “[w]hile we do not expect large numbers of prosecutions, the law sends a message that this country will not tolerate its citizens going offshore to abuse the children of other countries.”

Likewise, a U.S. Congressional Budget Office cost estimate for the Sex Tourism Prohibition Improvement Act of 2002 suggested that the increase in costs under the new legislation would be minimal “because of the small number of additional cases likely to be affected.”

The argument that child-sex tourism laws are most powerful as deterrents, however, is not supported by the statistical trend in child-sex tourism. Since Australia’s adoption of the CST Act a decade ago, the number of sex tourists continues to be appallingly high; Australians continue to represent a significant percentage of this number.

Australia’s experience over the past ten years does little to support the belief that the PROTECT Act is the ultimate answer to combating sex tourism originating in the United States. In virtually all material respects, the PROTECT Act and the Australian CST Act are identical. In addition, one procedural distinction between the U.S. and Australian child-sex tourism

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175 H.R. Rep. 107-525 (2002) (Background and Need for the Legislation). “There would be no need for a sex tourism statute if foreign countries successfully prosecuted U.S. citizens or resident aliens for the child-sex crimes committed within their borders.” Id. at 3.


177 Wallace, supra note 29 (quoting Mark Lever, aide to Australian Attorney General Michael Lavarch).


179 See Children and Sexual Exploitation, supra note 70.
laws – the availability of remote testimony in Australian proceedings – may in fact render the PROTECT Act less effective than the CST Act.

D. Extension of Remote Video Testimony Accommodation to Child-Sex Tourism Prosecutions is Likely Barred by the U.S. Constitution

Unlike the PROTECT Act, the CST Act provides for specific accommodations for foreign witnesses testifying in sex tourism prosecutions. Australia’s CST Act includes a provision allowing a witness to testify from the foreign country by “video link” in court proceedings when the witness’ presence would be too costly or too distressing. Allowing for remote testimony by child victims would aid U.S. prosecutors in these complex evidentiary cases and would likely lead to more convictions. The unique U.S. constitutional protection of a criminal defendant’s right to confront an accuser, however, likely prohibits remote testimony in child-sex tourism prosecutions, posing an additional obstacle that will hinder the U.S. government’s ability to successfully prosecute child-sex tourists.

1. Unlike Australia’s CST Act, the PROTECT Act is Not Likely to Permit Specific Accommodations for Remote Testimony by Foreign Witnesses

Australia’s CST Act provides special accommodations for remote testimony of foreign witnesses, a provision the United States is not likely able to permit in its child-sex tourism law. Australia’s CST Act includes a specific provision allowing for video testimony by witnesses outside of Australia in child-sex tourism prosecutions. A court may allow video testimony by a witness located outside of Australia upon a finding that the attendance of the witness would be too inconvenient, too distressing to the witness, or if the witness would be so intimidated that his or her reliability

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181 Id. pt. IIA, div. 5, § 50EA.
182 Indeed, the United States already has a statute that provides a similar accommodation to child witnesses domestically. 18 U.S.C. § 3509(b)(1) (2003).
183 CST Act, No. 105, pt. IIA, div. 5.
184 Id. pt. IIA, div. 5, § 50EA(d)(i). The Act allows video testimony upon a finding that live witness testimony “[would] cause unreasonable expense or inconvenience.” Id.
185 Id. pt. IIA, div. 5, § 50EA(d)(ii). The Act allows video testimony upon a finding that live witness testimony “[would] cause the witness psychological harm or unreasonable distress.” Id.
would be greatly reduced. In addition, the court must be satisfied that the use of satellite link testimony "is consistent with the interests of justice." In the case against Robert Marlow, several of the Fijian boys testified against Marlow via satellite link to Fiji; the testimony helped lead to his conviction.

While the Australian sex tourism law specifically provides for video testimony by remote witnesses, this express provision is absent from the PROTECT Act. Domestically, however, a U.S. statute, 18 U.S.C. § 3509, provides similar accommodations to vulnerable child witnesses. Unlike the CST Act, in which the remote testimony provision is explicitly linked to child-sex tourism prosecutions, section 3509 is a general evidentiary tool that allows a child to give live testimony via two-way closed circuit television in federal proceedings involving alleged offenses against the child.

Section 3509 also differs from the CST Act's foreign witness accommodation in that section 3509 applies specifically to child witnesses under age eighteen, while the CST Act applies to all witnesses outside of Australia. Furthermore, the CST Act allows remote video testimony even if its sole justification is to save money or prevent inconvenience. In contrast, section 3509 requires a court finding that the child witness is unable to testify due to fear or infirmity, or that there is a substantial likelihood that the child would suffer emotional trauma by testifying. To support this finding, the court may question the minor outside of the courtroom with the prosecutor and defense counsel present. If the court finds that the child is unable to testify in open court for one of the

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186 Id. pt. IIIA, div. 5, § 50EA(d)(iii). The Act allows video testimony upon a finding that live witness testimony "[would] cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced." Id.
187 Id. pt. IIIA, div. 5, § 50EA(e).
188 See supra Part IV.B.
189 See Monsters in Paradise, supra note 76.
191 18 U.S.C. § 3509(b)(1). Section 3509 was first adopted as part of the Crime Control Act of 1990. 101 P.L. 647, Title II, Subtitle D, 225(a), 104 Stat. 4789, 4798 (1990). Congress passed § 3509 due to a finding that "too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." Id. at § 211, 104 Stat. at 4792.
192 18 U.S.C. § 3509(b)(1) (2003). Children eligible for this accommodation are those who are victims of alleged physical abuse, sexual abuse, exploitation, or who are witnesses to a crime committed against another person. Id. § 3509(a)(2).
195 Id. pt. IIIA, div. 5, § 50EA(d)(i).
197 Id. § 3509(b)(1)(C).
aforementioned reasons, the testimony of the child will be taken outside the
courtroom, in the presence of the attorney for the government and the non-
pro se defense attorney, and will be televised live to the courtroom for
viewing by the jury, judge, and defendant. The child is still subject to
direct and cross-examination.

The viability of applying section 3509 to foreign child witnesses in
sex tourism prosecutions under the PROTECT Act has yet to be tested. In
the pending case against Michael Lewis Clark, representatives from the
U.S. Attorney’s Office intend to physically transport witnesses from
Cambodia if the case proceeds to trial. In the case against Michael
Hersh, the child victims also testified at trial. As more charges are filed
under the PROTECT Act, however, there will likely be situations in which
traveling to the United States to relive the traumatic events in the presence of
the offender would be too distressing for a child. At the same time, the
testimony of the child may be vital to proving the offense. In these
situations, the question will arise whether section 3509 can stretch far
enough to include child victims of sex tourism who have never set foot in
the United States. The U.S. defendant will likely argue that the extension of
section 3509 to allow foreign child witnesses will violate his constitutional
right of confrontation.

2. Applying Section 3509 to Remote Testimony in PROTECT Act Cases
Would Likely Violate Criminal Defendants’ Constitutional Right to
Confront Their Accusers

In the United States, a criminal defendant’s right to confront an
accuser is guaranteed by the Sixth Amendment to the Constitution. This
right of confrontation has been interpreted to include four elements: a right
to a “face-to-face meeting;” a guarantee that the witness will testify under
oath, thus ensuring that the witness is cognizant of the matter’s
seriousness; a right to cross-examine the witness; and the ability of the
jury to “observe the demeanor” of the witness to determine credibility.

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198 Id. § 3509(b)(1)(D).
199 Id.
200 See supra Part III.C.
201 Carter, supra note 4.
202 See supra Part III.A.
203 United States v. Hersh, 297 F.3d 1233, 1247 n.19 (11th Cir. 2002).
204 U.S. Const. amend. VI. “[T]he accused shall enjoy the right...to be confronted with the
witnesses against him.” Id.
In 1990, the U.S. Supreme Court held that a state statute, similar to section 3509, did not violate the defendant's right of confrontation. The Court reasoned that the right to face-to-face confrontation, although important, is not required in every instance. After this decision, the U.S. Congress enacted section 3509, and the Ninth Circuit Court of Appeals affirmed its constitutionality in 1993. Although video testimony has been found to be constitutional, the Supreme Court stressed that the right of face-to-face confrontation may be removed only when an “important public policy” reason exists, and only “where the reliability of the testimony is otherwise assured.”

The strict requirements of this test are unlikely to be met when foreign witnesses are used in child-sex tourism prosecutions because specific procedural safeguards required in section 3509 cannot be guaranteed in foreign proceedings. Although protecting child-sex tourism victims from the trauma of court proceedings represents an important public policy, the testimony’s reliability would not likely be sufficiently assured to allow section 3509 remote testimony in U.S. child-sex tourism proceedings.

a. Protecting the child witness is an important public policy justification

The U.S. Supreme Court’s interpretation of the Sixth Amendment has two requirements. First, there must be an important public policy justification before a witness will be permitted to testify outside the presence of the defendant. U.S. courts would likely find that protecting vulnerable child victims in child-sex tourism cases represents an important public policy, hence sufficient to meet the first requirement.

The acute need to accommodate and protect vulnerable child witnesses has received widespread international recognition. The United Nations Convention of the Rights of the Child recognizes the vulnerability of the child and the need for “special safeguards and care, including appropriate legal protection.”

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207 Id. at 846, quoting Green, 399 U.S. at 158.
208 Id.
209 Id. at 836.
210 Id. at 847. The Craig Court examined a Maryland statute which allowed for one-way closed circuit television in cases where children are abused. Id. at 840-42. One-way closed circuit television allows the witness to see the defendant, but the defendant cannot see the witness. Id at 841. Two-way closed circuit television allows the witness and defendant to see each other. 18 U.S.C. § 3509(b)(1)(D) (2003).
212 Craig, 497 U.S. at 850.
213 Id.
215 Id.
Prosecutors, recognizing that a child victim's testimony is often vital to apprehending and convicting sex offenders, calls upon prosecutors to utilize trial procedures that lessen the trauma experienced by a child witness, while ensuring that the testimony is reliable and of good quality.\textsuperscript{216} Suggested procedures include the use of closed circuit television, screens between the defendant and the witness, or an intermediary to assist the child in providing evidence.\textsuperscript{217}

U.S. courts have consistently recognized the protection of a child's psychological and physical well-being as an important public policy interest.\textsuperscript{218} Considering the congressional support for the PROTECT Act and its protection of foreign victims of child-sex tourism, courts would likely extend this recognition to children involved in sex tourism cases. Therefore, courts are likely to hold that shielding child-sex tourism victims from the trauma of court proceedings is an important public policy interest.

\textbf{b. Reliability of testimony cannot otherwise be assured}

In addition to requiring the existence of an important public policy before permitting any proceeding that encroaches upon the constitutionally guaranteed right of confrontation, the Sixth Amendment also requires that the reliability of the testimony be "otherwise assured."\textsuperscript{219} Specific procedural safeguards in U.S. trial proceedings where the right of direct confrontation is denied allow for the reliability of the testimony to be otherwise assured. For example, section 3509 requires that the court and counsel follow specific procedures if a witness is testifying outside of the courtroom.\textsuperscript{220} Admittedly, the application of section 3509 to sex tourism victims located abroad was likely beyond the contemplation of the drafters.\textsuperscript{221} While a witness exempted from a court appearance under section 3509 must still submit to the procedures set forth in the statute, a foreign


\textsuperscript{217} Id.

\textsuperscript{218} Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). \textit{See also} Craig, 497 U.S. at 853. \textit{But see id. at} 862 ("[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could override a defendant's right to face his or her accusers in court") (Scalia, J., dissenting).

\textsuperscript{219} Craig, 497 U.S. at 850.


\textsuperscript{221} Section 3509 was enacted in 1990, which was slightly before widespread recognition of the severity and extent of child-sex tourism, and four years before the first U.S. attempt to combat child-sex tourism with legislation.
citizen testifying abroad might not be required to follow the same procedures. Procedural requirements include the court’s competency finding, the right of cross-examination, and the necessity that each witness swear to an oath. Without these full procedural safeguards, the reliability of witness testimony cannot be assured. Allowing for remote testimony by foreign child-sex tourism victims would thus violate the defendant’s right of confrontation.

i. Foreign witness testimony, subject to foreign laws, complicates evidence-gathering and compromises reliability

When obtaining evidence abroad, the evidence must be procured in accordance with the laws of the foreign country. Any attempt to obtain evidence in derogation of the foreign country’s laws would infringe upon that country’s sovereignty and potentially threaten diplomatic relations. In addition, such unlawful acts could result in the arrest or detention of participants, even American prosecutors.

Obtaining evidence from a foreign country could be a fairly straightforward process, or an impossible one, depending upon the country’s diplomatic relationship with the United States. Until recently, letters rogatory were the most common method for obtaining evidence. The process was often slow and aggravating. The primary alternative to a

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222 See infra Part V.D.2.b.ii.
224 Id. § 3509(b)(1)(D).
225 FED. R. EVID. 603.
227 Id.
228 Id.
229 Id. China, for example, imposes very strict restrictions upon foreign requests for evidence. U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, JUDICIAL ASSISTANCE: CHINA, available at http://travel.state.gov/china_legal.html (last visited Jan. 28, 2004). Except for one isolated case in 1989, U.S. efforts to get Chinese permission to conduct depositions have been unsuccessful. Id.
230 U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL: LETTERS ROGATORY, tit. 9, §275 available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00275.htm (last visited Jan. 28, 2004) [hereinafter LETTERS ROGATORY]. A letter rogatory, or “letter of request” is defined as “A document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case.” BLACK’S LAW DICTIONARY 916 (7th ed. 1999).
231 Because of the diplomatic chain through which the letter must travel, the process can be extremely slow. The U.S. State Department states that “[l]etters rogatory are a cumbersome, time consuming mechanism which should not be used unless there is no other alternative.” OBTAINING EVIDENCE, supra note 226, at pt. I-1. Letters rogatory may take from six months to a year or longer to execute. U.S. DEP’T
letter rogatory is a Mutual Legal Assistance in Criminal Matters Treaty ("MLAT"), a relatively new tool that aids prosecutors in obtaining evidence in foreign countries. Of the Southeast Asian countries that currently have a burgeoning sex tourism industry, the United States currently has MLATs in force with only the Philippines and Thailand. Whether using letters rogatory or MLATs, securing evidence from abroad takes time. Recognizing the probability of delay, Congress enacted provisions that suspend the statute of limitations and the requirements of the Speedy Trial Act in certain situations.

Whatever the method used by prosecutors, foreign law still governs the acquisition of evidence abroad. If U.S. prosecutors seek testimony from a witness abroad, the witness is bound to testify according to the foreign country’s standards for criminal proceedings. Some countries allow U.S. consular officers to administer oaths to witnesses in voluntary depositions taken in that country, but the use of this technique is always subject to formal permission from the host country. Each country restricts when such techniques may be employed, which is likely to present problems when attempting to adhere to strict U.S. statutory requirements. For example, although Thailand permits voluntary depositions for criminal proceedings to occur within its borders, the witness may refuse to take an

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231 MLATs are generally only available to the prosecutors, and defense counsel must usually resort to letters rogatory to obtain evidence. U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATIES (MLATs) AND OTHER AGREEMENTS, available at http://travel.state.gov/nlat.html (last visited Jan. 28, 2004) [hereinafter MLATs].
232 Id.
233 Id.
234 Id.
236 The Speedy Trial Act requires prosecutors to file an information or indictment within 30 days of a defendant’s arrest, and the defendant’s trial must begin within 70 days of the filing. 18 U.S.C. § 3161(b)-(c). However, when evidence must be obtained from abroad, such a speedy trial is not necessarily guaranteed for the defendant. Id. § 3161(b)(9). The clock stops for up to a year when there has been an official request for evidence from a foreign country. Id.
237 OBTAINING EVIDENCE, supra note 226, pt. C.
238 Ellis & Pisani, supra note 232, at 205.
239 Id.
Furthermore, an American attorney is not usually permitted to participate in any kind of Thai proceeding if testimony is compulsory.\textsuperscript{244} Although tools such as MLATs and increased international cooperation help prosecutors to more effectively obtain evidence, they do not allow the United States to unilaterally set the course for judicial proceedings abroad. Restraints upon U.S. prosecutors make it unlikely that they could require specific procedural safeguards when obtaining witness testimony from a foreign country in child-sex tourism prosecutions. As a result, testimony may be less reliable.

\textit{ii. Section 3509 safeguards could not be guaranteed abroad}

Without a guarantee that the specific safeguards set forth in section 3509 will be followed, the reliability of witness testimony abroad cannot be assured. For example, section 3509 calls for the court to determine whether the child is able to testify, and suggests that the court “question the minor in chambers, or at some other comfortable place other than the courtroom.”\textsuperscript{245} If the witness is located in a foreign country, the judge would not have an in-person meeting, but rather would need to determine the child’s competency via video or some other indirect method. Furthermore, if the trial testimony is taken by video, the defense attorney also “shall be present.”\textsuperscript{246} Although this is required by section 3509, it can not be assured if the child is located abroad. Rather, the defense attorney would only have the right to be present if the foreign jurisdiction so allowed.\textsuperscript{247}

The requirement that all witnesses in U.S. proceedings swear to an oath,\textsuperscript{248} a necessary element of the defendant’s right of confrontation,\textsuperscript{249} might also be threatened. Under foreign procedures, it would not be guaranteed that a child witness would be required to swear to an oath before testifying in a sex tourism case.\textsuperscript{250}

Prosecutors seeking to utilize section 3509 to obtain foreign child witness testimony will probably look to the fact that Australia explicitly

\textsuperscript{243} JUDICIAL ASSISTANCE: THAILAND, supra note 231.
\textsuperscript{244} Id.
\textsuperscript{245} Id. § 3509(b)(1)(C).
\textsuperscript{246} Id. § 3509(b)(1)(D).
\textsuperscript{247} See supra Part V.D.2.b.i.
\textsuperscript{248} FED. R. EVID. 603.
\textsuperscript{250} See, e.g., JUDICIAL ASSISTANCE: THAILAND, supra note 231. See also supra Part V.D.2.b.1. It is even uncertain whether the witness is subject to prosecution for perjury in the United States if testifying under foreign procedures.
allows for video testimony in sex tourism cases. The unique U.S. constitutional right of confrontation, however, will likely prevent the United States from making the same accommodation. Australia does not have a constitutional guarantee of confrontation. Particular safeguards that are required in the United States to assure the reliability of the testimony are, therefore, absent in Australia. For example, Australia does not always require that a child witness testify under oath.\textsuperscript{251} A child can only give evidence under oath if the court deems the child competent to understand the nature of the oath.\textsuperscript{252} If the court does not make this finding, the child can still testify, without swearing to an oath.\textsuperscript{253} The United States does not have this flexibility. When the reliability of witness testimony cannot be assured, the U.S. constitutional right of confrontation will prohibit use of the testimony.

Because any given child victim in a sex tourism case abroad is as deserving of protection as any child victim located in the United States, the prospect of extending section 3509 to include sex tourism cases represents an important policy interest. Australia was likely able to provide additional protection to child victims because its constitution affords no right of confrontation to criminal defendants. In contrast, by allowing remote testimony by foreign child witnesses abroad, U.S. courts would potentially erode constitutional rights provided to the defendant, an unlikely and undesirable course of action. Accordingly, U.S. prosecutors will likely have a difficult time presenting necessary evidence for PROTECT Act prosecutions.


\textsuperscript{252} Evidence Act, 1995, s. 13 (Austl.). \textit{But see} Sandra Shrimpton et al., \textit{The Child Witness and Legal Reforms in Australia}, in \textit{INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN'S TESTIMONY} 132, 138-39 (Bette L. Bottoms & Gail S. Goodman eds., 1996) (noting new legislation in New South Wales which renders the competency test less restrictive for children, creating a presumption of competency unless the court is satisfied otherwise).

\textsuperscript{253} Evidence Act, 1995, s. 13 (Austl.).
VI. RECOMMENDATIONS FOR SUCCESSFUL PREVENTION OF CHILD-SEX TOURISM

A. Focus Investigations and Prosecutions on the Organizers of Child-Sex Tours, Not the Perpetrating Tourists

The significant resources needed to halt child-sex tourism should be focused on tour organizers, not individual tourists. Extensive international mechanisms must be in place to facilitate the arrest of a child-sex tourist abroad. Michael Lewis Clark’s 2003 arrest highlights the need for extensive collaboration. This investigation was the result of cooperation between many groups, including the U.S. Attorney’s Office, U.S. Customs in Thailand, the Cambodian National Police Commissioner General, the Prime Minister of Cambodia, the Regional Security Office of the American Embassy in Phnom Phen, the Australian Federal Police, the Joint Transnational Crime Investigation Team, and two NGOs. Such a large-scale effort surely reduced the likelihood that Clark could slip through the system. The reality, however, is that cooperation among such a wide array of law enforcement and investigative bodies is impractical to facilitate the arrest of every sex tourist.

Instead of allocating funds and personnel for the investigations of individual sex tourists, U.S. and Australian law enforcement officials should focus investigations on the operators of child-sex tours. This strategy has three particular advantages over the individual prosecution strategy employed in cases such as Clark’s.

First, it allows the investigation to remain local. Law enforcement officials are on familiar turf and can therefore operate investigations with

254 U.S. Immigration and Customs Enforcement, supra note 5. The NGOs were “Action Pour Les Enfants” and “Friends.” Id.

relative ease, unhindered by MLATs, prohibitive costs, or complex diplomatic relations. Second, the actions of a child-sex tour organizer may be more amenable to change, while the motivations driving the actions of child-sex tourists may be deeply rooted and difficult to influence. For example, the child-sex tourist may be a pedophile, motivated by a mental abnormality that may not be treatable. Efforts to deter such tourists through heightened penalties or public awareness may do nothing, given the deviant urges that are beyond the child-sex tourist’s control. In contrast, the child-sex tour organizer is likely motivated by the profits of lucrative child-sex tourism, a motivation more amenable to change. Heightened criminal penalties for organizers will likely reduce the number of individuals willing to take this risk. Public awareness about the prosecutions of other organizers is also more likely to act as a deterrent.

Finally, and most importantly, child-sex tour organizers represent many child-sex tourists. While apprehending a solo sex tourist removes only one person from the industry, shutting down a child-sex tourism agency can block a far greater number of sex tourists. Thus targeting sex tour operators is more likely to result in a reduction of the total number of sex tourists and, therefore, a reduction in the number of child victims.

B. Treat the Disease, not the Symptom

Until the roots of child-sex tourism are addressed, for every child-sex tourist removed from the industry, another will step in to fill his place. The massive disparity in resources between developed and developing countries enables child-sex tourism to flourish. Ironically, many developing countries are encouraged to attract tourism to improve their economic conditions. In reality, not only does tourism in developing countries allow more access by child-sex tourists, but it can also have deleterious effects on the local economy:

Tourism is seen as a way of getting the money to pay off the country’s debt to the IMF and the World Bank. They have to

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256 Pedophilia is characterized as a Paraphilia. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 523 (4th ed. 1994) [hereinafter DSM-IV]. The DSM-IV provides that the essential features of a Paraphilia are “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one’s partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months.” Id. at 522-23. The paraphilic focus of Pedophilia involves sexual activity with a prepubescent child (generally age 13 years or younger). Id. at 527.

257 See SEABROOK, supra note 25, at 154.
build bigger hotels, better roads, more resorts, to attract foreigners... It turns out to be a drain on the resources of the country, not a gain; and when you add the social costs, it becomes disastrous. Tourists are not going to pay for the health care of sex workers with AIDS.\(^{258}\)

There is no easy solution. However, the first step should be recognition that the problem is far greater than the law of any one country, or than any one country’s ability or inability to enforce the law.

VII. CONCLUSION

Child-sex tourism causes irreparable harm to hundreds of thousands of children worldwide. Both the United States and Australia, recognizing their own citizens’ involvement as sex tourists, enacted child-sex tourism legislation in the past decade, but achieved only disappointing results. With the adoption of the PROTECT Act in 2003, the United States significantly expanded the reach of its child-sex tourism law, and recent arrests suggest those changes might result in greater success. However, considering the PROTECT Act’s similarity to existing Australian law and the additional barriers to prosecution imposed by the U.S. Constitution’s Sixth Amendment, the PROTECT Act is unlikely to have any significant greater success than Australia’s eleven convictions in the last decade.

While an important first step, it is unlikely that the PROTECT Act will ever strike a powerful blow against the international child-sex trade. By adopting the PROTECT Act, the United States expanded its child-sex tourism law. When the law is applied, the penalties will be harsh for the sex tourist or sex tour organizer. To this end, the United States should focus its limited resources upon prosecuting sex tour organizers, which should lead to a greater impact in the sex-tourism industry. Although the cost and difficulty of working through the complex legal processes necessary to secure foreign evidence and witnesses will almost certainly keep the number of convictions low, the creation of an appropriate legal tool is a positive first step toward alleviating the problem of child-sex tourism. The law, however, should only be seen as just that—a first step—as it will never be able to address the far greater problems leading to child-sex tourism.

In the end, a solution that stretches beyond criminal penalties to treat the roots of the problem is likely to be the most successful. The law can

\(^{258}\) Id.
never address the economic disparity between, on the one hand, the United States and Australia and, on the other hand, developing countries where economic conditions can be so poor as to cause poverty-stricken families to sell their children into prostitution. Nor does the law recognize that foreign investment, in the form of military installations or tourism dollars, often can contribute to the industry. The law cannot address the fact that global trafficking of children, often influenced by ethnic and gender discrimination, forces girls from particular tribes to work as prostitutes. The law can do nothing to change the situation in foreign countries where local law enforcement, lacking infrastructure or easily swayed by bribes, does little to enforce local laws against sexual abuse of children. With the adoption of child sex tourism laws, the United States and Australia have demonstrated a willingness to take up arms against the forces that lead to this devastating industry. Now, if they truly hope to protect the children, they must fight.