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

Karen D. Breckenridge[†]

*"We thought tourism produced beggar children, which it does; but as we came to know them, we realized they were selling their bodies too."*¹

--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,² which victimizes hundreds of thousands of children,³ 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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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.

Cambodian boys.⁴ 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.⁵ 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").⁶ The PROTECT Act seeks to strengthen laws punishing individuals who travel abroad and sexually exploit children.⁷

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.⁸ The government sentenced Marlow to three years in jail⁹ under Australia's Crimes (Child-Sex Tourism) Amendment Act of 1994 ("CST Act").¹⁰

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.¹¹ A 1996 United Nations report estimated that a total of one million children were sexually exploited in Asia alone.¹²

Unlike Clark and Marlow, however, most sex tourists escape identification and prosecution.¹³ Because a large percentage of sex tourists

⁴ Mike Carter, *Indictment of State Man Part of Fight Against Child Sex Trade*, SEATTLE TIMES, Sept. 25, 2003, at B4.

⁵ Press Release, U.S. Immigration and Customs Enforcement, *Man Charged with Traveling to Cambodia and Engaging in Illicit Sex with Minors is First Person Charged under New Provision of the PROTECT Act* (Sept. 24, 2003), available at <http://www.bice.immigration.gov/graphics/news/newsrel/articles/protectact092403.htm> (last visited Mar. 8, 2004).

⁶ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., & 42 U.S.C.) [hereinafter PROTECT Act]. See also U.S. Immigration and Customs Enforcement, *supra* note 5.

⁷ Press Release, Department of Justice, Fact Sheet: PROTECT Act (Apr. 30, 2003) available at http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm (last visited Mar. 8, 2004) [hereinafter PROTECT Act Fact Sheet].

⁸ Child Wise, *Child Sex Tourism Charges*, at www.ecpat.org/prosecutions.html (last visited Mar. 8, 2004).

⁹ *Who Will Stop Them Now?* SUNDAY AGE (MELBOURNE), Oct. 29, 2000, at 1.

¹⁰ Crimes (Child Sex Tourism) Amendment Act of 1994, No. 105, Pt. IIIA [hereinafter CST Act]. This legislation amended the Crimes Act 1914. *Id.*

¹¹ End Child Prostitution in Asian Tourism, Frequently Asked Questions about CSEC [Commercial Sexual Exploitation of Children] at "Child Sex Tourism" page, available at <http://www.ecpat.net/eng/CSEC/faq/faq.asp> (last visited Mar. 8, 2004) [hereinafter ECPAT FAQ].

¹² *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, U.N. ESCOR Commission on Human Rights, 52d Sess., Agenda Item 20(b), ¶ 34, U.N. Doc. E/CN.4/1996/100 (prov. ed. 1996).

¹³ Douglas Hodgson, *Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies*, 19 MELB. U. L. REV. 512, 518 (1994).

originate in the United States and Australia,¹⁴ both countries adopted laws that permit the prosecution of sex tourists.¹⁵ In 2003, the United States strengthened its existing sex tourism law by adopting the PROTECT Act,¹⁶ designed to prevent Americans from sexually abusing children while traveling abroad.¹⁷

Unfortunately, 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.¹⁸ 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.¹⁹

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.

¹⁵ 18 U.S.C. §§ 2423 (2003) (codifying U.S. child-sex tourism law). CST Act, No. 105, Pt. IIIA (1994) (codifying Australian child-sex tourism law). Like Australia, the United States initially adopted this law in 1994. Child Sexual Abuse Prevention Act, Pub. L. No. 103-322, § 160001(g), 108 Stat. 2037 (1994). CST Act, No. 105, Pt. IIIA.

¹⁶ PROTECT Act, Pub. L. No. 108-21, § 105, 117 Stat. 650 (2003).

¹⁷ H.R. Rep. 107-525 (2002) (discussing background and need for the legislation).

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.²⁰ 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 victims²¹ is sexual exploitation.²² 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.²³ 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.²⁴ It is not surprising, therefore, that Southeast Asia has the highest number of child prostitutes in the world.²⁵

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

²⁰ See *infra* Part II.A.

²¹ While there is no international agreement on the definition of "trafficking," "child trafficking" is generally defined as any situation where a child is moved to a new location and exploited. *Child Trafficking: A Prevailing Social Dilemma*, BUS. WORLD (PHILIPPINES), Aug. 5, 2003. Children may be subject to many forms of exploitation, which include being pressed into domestic services, sweatshop labor, adoption, military service, pornography, forced marriages, and sex. ECPAT FAQ, *supra* note 11, at "Trafficking in Children" page. Article 1 of the United Nations Convention on the Rights of the Child defines "child" as a person under the age of 18. The United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 1, U.N. Doc. A/44/736 (1989).

²² *Human Trafficking, Especially in Women and Children, to be the Focus of UN Crime Commission Meeting*, UN INFORMATION SERVICE, May 13, 2003, available at http://www.ecpat.net/eng/Ecpat_inter/IRC/tmpNews.asp?SCID=1061 (last visited Dec. 22, 2003).

²³ Jeremy Lovell, *One Million Children Trafficked Each Year - UNICEF*, REUTERS, July 29, 2003, available at http://www.ecpat.net/eng/Ecpat_inter/IRC/tmpNews.asp?SCID=1115 (last visited Feb. 25, 2004). Although sexual exploitation of children is a worldwide phenomenon, this Comment focuses specifically on its acute manifestations in the Pacific Rim region.

²⁴ ECPAT FAQ, *supra* note 11, at "Trafficking in Children" page.

²⁵ SEABROOK, *supra* note 1, at 151. See also VITTI MUNTARBHORN, SEXUAL EXPLOITATION OF CHILDREN, HUMAN RIGHTS STUDY SERIES at 8, U.N. Sales No. E.96.XIV.7 (1996) (identifying Asia, Central America and South America, as having the highest absolute numbers of child prostitutes).

exploitation of children by persons who travel from their own country to another usually less-developed country to engage in sexual acts with children."²⁶ Sex tourism is now so prevalent that a definition, albeit somewhat misleading, can even be found in the Oxford dictionary.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,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.²⁹ Recent reports confirm that these numbers continue to rise throughout Asia.³⁰ For example, over the past three years, Thailand has seen a twenty percent increase in its number of child prostitutes.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.³² For example, the industry grew rapidly in the late 1960s during the Vietnam War.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.³⁴ Today, foreign investment in Southeast Asia, spurred by

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.

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).

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. *Id.* However, because the activities associated with the industry are by nature secretive, the numbers given in various reports can only be estimates. *Id.*

²⁹ Charles P. Wallace, *Widening the War on Child Sex*, L.A. TIMES, July 13, 1994, at A1.

³⁰ Lin Lean Lim, *Child Prostitution, in THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* 170, 173 (Lin Lean Lim ed., 1998) [hereinafter *Child Prostitution*].

³¹ *Human Trafficking, supra* note 22.

³² ECPAT FAQ, *supra* note 11, at "Child Prostitution" page.

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

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.³⁵ As a result of Southeast Asia's economic growth in the past four decades, prostitution has become a billion dollar industry.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.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."³⁸

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

³⁵ ECPAT FAQ, *supra* note 11, at "Child Prostitution" page.

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).

³⁷ See Todres, *supra* note 27, at 3.

³⁸ Wallace, *supra* note 29.

³⁹ *International Perspectives*, *supra* note 14, at 10.

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).

⁴¹ *Child Prostitution*, *supra* note 30, at 174.

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.*

⁴³ *Id.* The girls usually have no idea what the total amount of their debt is, nor the terms for repayment. *Id.*

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.*

to prostitution⁴⁵ in an effort to support their families,⁴⁶ or, at the other extreme, to escape from an abusive domestic situation.⁴⁷ 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;⁴⁸ children orphaned by war or AIDS;⁴⁹ a desire to obtain material wealth;⁵⁰ and gender⁵¹ and ethnic discrimination.⁵² 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.⁵³ Child-sex tourists come from all areas of the world.⁵⁴ While the majority is male,⁵⁵ 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.*

⁵¹ Lin Lean Lim, *The Economic and Social Bases of Prostitution in Southeast Asia*, in *THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* 1, 12 (Lin Lean Lim ed., 1998) [hereinafter *Economic and Social Bases*]. Female children are frequently given fewer academic and employment opportunities, while cultural and religious traditions often project an image of girls as sexual objects. Margaret A. Healy, Note, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 *FORDHAM INT'L L.J.* 1852, 1872 (1995).

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.⁵⁶ Sex tourists may travel individually or they may come with organized groups, including commercially organized sex tours.⁵⁷ Child-sex tourists can, however, be divided into at least two categories.⁵⁸ “Preferential” sex tourists have a definite sexual preference for children and initiate travel with the intent to service those desires.⁵⁹ In contrast, “situational” sex tourists seize the opportunity to engage in illegal sexual activity with children without any preconceived intent to do so.⁶⁰

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.⁶¹ Others are attracted by the region’s relative anonymity,⁶² which is facilitated by ineffective local law enforcement that allows them to visit various locales virtually undetected.⁶³ Still others are attracted to a stereotype of Asian women as being more nurturing, sexually desirable, or passive than Western women.⁶⁴

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.⁶⁵ Child victims are also at an increased risk of contracting sexually transmitted diseases.⁶⁶ One Cambodian NGO reported that approximately seventy percent of the girls rescued from

⁵⁶ SEABROOK, *supra* note 25, at 39.

⁵⁷ Hodgson, *supra* note 13, at 515-16. In 1999, there were over 25 known companies in the United States offering sex tours abroad. Todres, *supra* note 27, at 4. In addition, over 100 web sites worldwide advertise teenage commercial sex in Asia alone. H.R. Rep. 107-525, sec. 2 (2002).

⁵⁸ ECPAT FAQ, *supra* note 11, at “Who Sexually Exploits Children” page.

⁵⁹ *Id.*

⁶⁰ *Child Prostitution*, *supra* note 30, at 179.

⁶¹ Margot Hornblower Paris, *The Skin Trade*, TIME, June 21, 1993, at 44. Prices vary, but one California-based sex tour agency advertises that prostitutes in Thailand cost as little as US\$ 13, or US\$ 25 for the entire day. DHP INC., THAILAND TOUR, available at <http://www.dexterhorn.com/trips/tourthai.htm> (last visited Feb. 20, 2004) (Warning: this web site includes graphic photos). Michael Lewis Clark reportedly paid US\$ 2 to each of the boys he allegedly sexually abused. Carter, *supra* note 4.

⁶² ECPAT FAQ, *supra* note 11, at “Who Sexually Exploits Children” page.

⁶³ H.R. Rep. 107-525, sec. 2 (2002). See also Hodgson, *supra* note 13, at 518.

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.⁶⁷ In addition to the physical effects of child-sex tourism, the psychological damage is immeasurable.⁶⁸ Many children suffer from depression, low self-esteem, and feelings of shame or guilt.⁶⁹ 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.”⁷⁰ 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.⁷¹ The Australian Human Rights and Equal Opportunity Commission⁷² 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.⁷³ U.S. Congresswoman Zoe Lofgren, testifying to the House Committee on the Judiciary, stated that American child-sex tourism is a “large issue.”⁷⁴ According to Lofgren, other House Members, while visiting Asian countries, observed American men “preying on small children.”⁷⁵ Along the same lines, the Australian Minister of Justice described Australian tourists as “significant sexual abusers of children overseas, particularly in Asia.”⁷⁶ In an effort to combat this widespread industry, fueled in large part

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.*

⁷⁰ Joseph P. Kennedy II, *Keynote Address, in* FORCED LABOR: THE PROSTITUTION OF CHILDREN SYMPOSIUM PROCEEDINGS 1, 3 (U.S. Dept. of Labor et al. eds., 1996).

⁷¹ *International Perspectives, supra* note 14, at 22.

⁷² The Human Rights & Equal Opportunity Commission is an independent statutory organization dedicated to protecting and fostering understanding of human rights in Australia. Australian Human Rights & Equal Opportunity Commission, *Information for Students: Children and Sexual Exploitation*, available at http://www.hreoc.gov.au/info_for_students/childrens_rights/children_and_sex_exploitation.html (last visited Mar. 8, 2004) [hereinafter *Children and Sexual Exploitation*].

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).

⁷⁴ SEX TOURISM PROHIBITION IMPROVEMENT ACT OF 2002, H.R. REP. NO. 107-525, at 14 (2002).

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;⁷⁷ yet in the ensuing decade, the federal government successfully convicted only two individuals under this legislation.⁷⁸ In an attempt to strengthen existing sex tourism legislation, Congress passed the PROTECT Act,⁷⁹ 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.⁸⁰ 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.⁸¹ Convictions under the 1994 Act carried a maximum ten-year prison sentence per count.⁸²

The 1994 Act was described as "a powerful blow against the growing international child-sex trade."⁸³ Under the 1994 Act, sex tourists could be

Id. Australians are found in particularly high numbers as operators of "bars and hang-outs" where child-sex tourism occurs. *The Ugly Australian Abroad in Asia*, THE AGE (Melbourne), Sept. 19, 2003, at 14.

⁷⁷ Child Sexual Abuse Prevention Act, Pub. L. No. 103-322, § 160001(g), 108 Stat. 2037.

⁷⁸ See *infra* Part III.A.

⁷⁹ PROTECT Act, Pub. L. No. 108-21, § 105, 117 Stat. 650 (2003).

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).

⁸¹ § 160001(g), 108 Stat. 2037.

⁸² *Id.* The penalty was increased to a maximum of 15 years in 1998. Protection of Children from Sexual Predators Act of 1998, 105 Pub. L. No. 105-314, § 103, 112 Stat. 2976 (1998).

⁸³ Joseph P. Kennedy II, *Crime Bill Cracks Down on Child Exploitation*, CHRISTIAN SCI. MONITOR, Sept. 6, 1994, at 19 [hereinafter *Crime Bill*].

convicted for their sexual acts abroad,⁸⁴ as long as there was evidence of the tourist's intent before leaving the United States.⁸⁵ In addition, the 1994 Act contained no double criminality requirement.⁸⁶ Thus, even if the sexual act was legal in the foreign country, the sex tourist could still be prosecuted domestically.⁸⁷

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.⁸⁸ 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 2003.⁸⁹ U.S. Representatives originally proposed the child-sex tourism provisions of the PROTECT Act as separate legislation in 2002.⁹⁰ 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."⁹¹ The sex tourism provisions were eventually incorporated

⁸⁴ § 160001(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, Coppel 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.*

⁸⁹ PROTECT Act, Pub. L. No. 108-21, §105, 117 Stat. 650 (2003).

⁹⁰ H.R. REP. NO. 107-525, Sec. 2 (2002).

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

⁹² PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., & 42 U.S.C.). In addition to the child-sex tourism laws, the PROTECT Act includes provisions establishing a national AMBER Alert program, increasing minimum sentencing for sex offenders, and strengthening child pornography laws. *Id.*

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.

⁹⁹ 18 U.S.C. § 2423(d).

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.¹⁰¹ 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.¹⁰²

The PROTECT Act also significantly increases the maximum sentence previously allowed under the 1994 Act.¹⁰³ Violators may now be imprisoned for up to thirty years per sexual act.¹⁰⁴ Accordingly, the U.S. Department of Justice claimed that the PROTECT Act "strengthens laws punishing offenders who travel abroad to prey on children."¹⁰⁵ 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.¹⁰⁶

1. 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.¹⁰⁷ Michael Lewis Clark was first arrested in Cambodia in June 2003.¹⁰⁸ Clark was extradited to the United States in early September 2003, where he was arrested.¹⁰⁹ 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.¹¹⁰ 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.

¹⁰¹ 18 U.S.C. § 2423(d).

¹⁰² *Id.* § 2423(e).

¹⁰³ *Id.* § 2423(b)-(d). When first adopted, the maximum penalty was 10 years. Child Sexual Abuse Prevention Act, Pub. L. No. 103-322, § 160001(g), 108 Stat. 2037 (1994). The penalty was increased to a maximum of 15 years in 1998. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 103, 112 Stat. 2976, 10001, 160001 (1998).

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.

children.¹¹¹ 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.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.¹¹³ Seljan was apparently preparing to travel to the Philippines to sexually exploit two young girls, ages nine and twelve.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."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.¹¹⁶

The third indictment under the PROTECT Act occurred on November 20, 2003.¹¹⁷ 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.¹¹⁸ All three boys were under the age of sixteen.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.¹²⁰

¹¹¹ See *id.* (Statistic derived from court documents).

¹¹² *Id.*

¹¹³ *RP-Bound American Charged with "Sex Tourism,"* PHILIPPINE STAR, Oct. 17, 2003.

¹¹⁴ Press Release, U.S. Immigration and Customs Enforcement, 85 Year Old Man Charged in Child Sex Tourism Case (Oct. 6, 2003), available at <http://www.bice.immigration.gov/graphics/news/newsrel/articles/sextourist100603.htm> (last visited Mar. 8, 2004) [hereinafter 85 Year Old Man Charged].

¹¹⁵ *RP-Bound American Charged with "Sex Tourism,"* *supra* note 113.

¹¹⁶ 85 Year Old Man Charged, *supra* note 114.

¹¹⁷ Press Release, U.S. Immigration and Customs Enforcement, Third Man Charged Under the PROTECT Act for Traveling to Cambodia and Engaging in Illicit Sex with Minors (Nov. 20, 2003), available at <http://www.ice.gov/graphics/news/newsrel/articles/protectact112003.htm> (last visited Mar. 8, 2004).

¹¹⁸ Paul Shukovsky, *Man is Indicted in Tourism Sex Case*, SEATTLE POST-INTELLIGENCER, Nov. 21, 2003, at B2.

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/nov/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.

¹²⁰ Vicki Silverman, *U.S. Law Enforcement Targets Child Sex Tourism*, DEP'T OF STATE WASH. FILE, Dec. 17, 2003, available at <http://www.usembassy.lt/pas/hyperfile/eur322.htm> (last visited Jan. 5, 2004).

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.¹²¹ 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.¹²² In 2000, advocates called upon New York prosecutors to file criminal charges against Big Apple.¹²³ At that time, however, Big Apple's actions were beyond the reach of prosecutors¹²⁴ because the 1994 Act only criminalized the acts of individuals and had no provision for sex tour organizers.¹²⁵ The state finally turned to a civil remedy under state law.¹²⁶ On August 20, 2003, New York Attorney General Eliot Spitzer announced that the state had filed a civil lawsuit against Big Apple.¹²⁷ The state successfully sought a temporary order to prevent Big Apple from advertising or promoting its sex tours.¹²⁸ The ultimate goal of such litigation is to force the closure of the agency via the imposition of financial penalties.¹²⁹

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.¹³⁰ Under the new provisions of the PROTECT Act,

¹²¹ 18 U.S.C. § 2423(d) (2003).

¹²² *Firm Offering Sex Tours Under Fire*, MANILA STANDARD, Aug. 22, 2003, available at <http://www.trafficking.org.ph/resources/news/inline/aug03/firm.htm> (last visited Feb. 8, 2004) [hereinafter *Sex Tours Under Fire*]. Equality Now alerted Attorney General Spitzer to the activities of the travel agency. *Id.* Equality Now is an organization dedicated to protecting the rights of women around the world. See http://www.equalitynow.org/english/navigation/hub_en.html (last visited Feb. 25, 2004).

¹²³ *Sex Tours Under Fire*, see *supra* at note 119.

¹²⁴ *Id.*

¹²⁵ Child Sexual Abuse Prevention Act, Pub. L. No. 103-322, § 160001(g), 108 Stat. 2037 (1994).

¹²⁶ Press Release, Office of New York State Attorney General Eliot Spitzer, State Seeks to Close Dutchess and Queens Based Travel Agency: Spitzer Sues Firm that Specialized in South East Asian "Sex Tours," (Aug. 20, 2003), available at http://www.oag.state.ny.us/press/2003/aug/aug20a_03.html (last visited Nov. 5, 2003) [hereinafter *Spitzer Sues*].

¹²⁷ *Id.* The suit "seeks injunctive relief prohibiting [Big Apple operators] from operating an unlawful business, civil penalties, and costs." *Id.*

¹²⁸ *Id.*

¹²⁹ See *Sex Tours Under Fire*, *supra* note 122.

¹³⁰ *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.¹³¹

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.¹³² The CST Act criminalized sexual intercourse¹³³ or acts of indecency¹³⁴ with a child under age sixteen committed outside of Australia by an Australian citizen or resident.¹³⁵ Under the CST Act, crimes involving sexual intercourse carry a maximum sentence of seventeen years imprisonment,¹³⁶ while crimes involving indecent acts with a child are punishable by up to twelve years imprisonment.¹³⁷ Australian prosecutors may also charge organizers of sex tours under the CST Act.¹³⁸ The CST Act makes it an offense to benefit from or encourage any conduct that would violate the aforementioned provisions.¹³⁹ Some examples of barred activities include "profiting from an arrangement that facilitates an

¹³¹ 18 U.S.C. § 2423(d) (2003).

¹³² CST Act, No. 105, pt. IIIA (1994). This legislation amended the Crimes Act 1914. CST Act, No. 105.

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"¹⁴⁰ and "assisting a person to travel outside Australia in order to commit an act that would constitute an offense."¹⁴¹ Finally, the CST Act has an additional evidentiary provision allowing for witness testimony by video link in court proceedings for offenses under the Act.¹⁴²

Prior to the PROTECT Act, U.S. and Australian sex tourism laws differed significantly.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ In addition, proving intent under the 1994 Act required that evidence of the sex tourist's activities be found in the United States.¹⁴⁶ The clandestine nature of sex tourism and the tourist's desire for secrecy made gathering such evidence difficult.¹⁴⁷

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.¹⁴⁸ Additionally, both statutes provide for the prosecution of sex tour organizers.¹⁴⁹ Indeed, procedural differences between the U.S. and Australian laws—such as the maximum sentence allowed with a conviction,¹⁵⁰ treatment of double jeopardy,¹⁵¹ and Australia's specific accommodation for remote testimony by foreign witnesses¹⁵²—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).

¹⁴³ *Compare* Child Sexual Abuse Prevention Act, Pub. L. No. 103-322, § 160001(g), 108 Stat. 2037 (1994), with CST Act, No. 105 (1994).

¹⁴⁴ § 160001(g), 108 Stat. 2037.

¹⁴⁵ ECPAT FAQ, *supra* note 11, at "Who Sexually Exploits Children" page.

¹⁴⁶ § 160001(g), 108 Stat. 2037.

¹⁴⁷ Daniel Edelson, Note, *The Prosecution of Persons Who Sexually Exploit Children in Countries Other Than Their Own: A Model for Amending Existing Legislation*, 25 FORDHAM INT'L L.J. 483, 537 (2001). Indeed, under the 1994 Act, the United States convicted only two men. *See supra* Part III.A.

¹⁴⁸ *Compare* 18 U.S.C. § 2423(c) (2003), with CST Act, No. 105, pt. IIIA, div. 2, §§ 50BA, 50BB, 50BC, 50BD.

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). 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.

¹⁵¹ CST Act, No. 105, pt. IIIA, div. 6, § 50FC. *See infra* Part V.B.

¹⁵² 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.¹⁵³ 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.¹⁵⁴ Of the sixteen individuals charged, eleven were convicted, one case is still pending, and four cases were dismissed.¹⁵⁵ Given the estimated number of sex tourists from Australia,¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ Lee was convicted in 1999 and sentenced to fourteen years in prison.¹⁵⁹ Similarly, Robert Marlow, a fifty-five-year-old Melbourne man, pled guilty in 2000 to sexually abusing boys while on business trips to Fiji.¹⁶⁰ Marlow was convicted and sentenced to three years in jail.¹⁶¹

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

¹⁵³ See *infra* Part IV.B.

¹⁵⁴ See *Child Sex Tourism Charges*, *supra* note 8.

¹⁵⁵ *Id.* The ECPAT list includes two listings that are no longer pending. One of these men, Jonathan Kaye (a.k.a. John Kosky), has been convicted. *Aussie Mentor Convicted of Running Child Sex Tours*, TEMPO (Feb. 25, 2003) available at <http://www.trafficking.org.ph/resources/news/inline/feb03/aussie.htm> (last visited Feb. 25, 2004) [hereinafter *Aussie Mentor Convicted*]. The other, a case involving a retired police officer in Queensland, was dropped. *Tourist Child Sex Charge Dropped*, COURIER MAIL (Queensland, Austl.), Feb. 20, 2003, at 3.

¹⁵⁶ See *supra* Part II.E.

¹⁵⁷ See *Child Sex Tourism Charges*, *supra* note 8.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

individuals who promote or encourage sex tourism.¹⁶² Kaye, a former schoolteacher, advertised his travel services in a local newspaper.¹⁶³ 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,”¹⁶⁴ and showed the man photographs of boys under age fifteen who could provide sex.¹⁶⁵ Kaye was convicted in 2003.¹⁶⁶ Kaye’s case marked the first time in Australia that a charge for encouraging sex tourism had gone to trial.¹⁶⁷ In addition to the convictions of Lee, Marlow and Kaye, just eight other Australian men have been convicted under the CST Act.¹⁶⁸

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,¹⁶⁹ while the CST Act does not. U.S. sex tourism defendants could be subject to prosecution both abroad and in the United States,¹⁷⁰ while this is barred as double jeopardy under the CST Act in Australia.¹⁷¹ 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.*

¹⁶³ *Man Faces Court Over Child Sex Tours to Thailand*, ABC ONLINE, Feb. 18, 2003, at <http://www.abc.net.au/news/newsitems/s787217.htm> (last visited Oct. 23, 2003) [hereinafter *Man Faces Court*].

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. *Id.*

¹⁶⁸ *See Child Sex Tourism Charges*, *supra* note 8.

¹⁶⁹ 18 U.S.C. § 2423(b) (2003).

¹⁷⁰ *See infra* Part V.B.

¹⁷¹ CST Act, No. 105, pt. IIIA, div. 6, § 50FC (1994).

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.¹⁷² 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.¹⁷³ 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.¹⁷⁴ 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

¹⁷² See *supra* Part III.A.

¹⁷³ CST Act, No. 105, pt. IIIA, div. 6, § 50FC (1994).

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.¹⁷⁵ 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.¹⁷⁶ 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."¹⁷⁷ 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."¹⁷⁸

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.¹⁷⁹

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

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.

¹⁷⁶ Wallace, *supra* note 29 (quoting Mark Lever, aide to Australian Attorney General Michael Lavarch). See also H.R. REP. NO. 107-525 at 4-5 (2002).

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

¹⁷⁸ H.R. REP. NO. 107-525 at 4-5 (2002).

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.¹⁸⁰ 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.¹⁸¹ Allowing for remote testimony by child victims would aid U.S. prosecutors in these complex evidentiary cases and would likely lead to more convictions.¹⁸² 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.¹⁸³ 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,¹⁸⁴ too distressing to the witness,¹⁸⁵ or if the witness would be so intimidated that his or her reliability

¹⁸⁰ CST Act, No. 105, pt. IIIA, div. 5 (1994).

¹⁸¹ *Id.* pt. IIIA, 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. IIIA, div. 5.

¹⁸⁴ *Id.* pt. IIIA, 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. IIIA, 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.¹⁸⁶ In addition, the court must be satisfied that the use of satellite link testimony "is consistent with the interests of justice."¹⁸⁷ In the case against Robert Marlow,¹⁸⁸ several of the Fijian boys testified against Marlow via satellite link to Fiji; the testimony helped lead to his conviction.¹⁸⁹

While the Australian sex tourism law specifically provides for video testimony by remote witnesses, this express provision is absent from the PROTECT Act.¹⁹⁰ Domestically, however, a U.S. statute, 18 U.S.C. § 3509, provides similar accommodations to vulnerable child witnesses.¹⁹¹ 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.¹⁹²

Section 3509 also differs from the CST Act's foreign witness accommodation in that section 3509 applies specifically to child witnesses under age eighteen,¹⁹³ while the CST Act applies to all witnesses outside of Australia.¹⁹⁴ Furthermore, the CST Act allows remote video testimony even if its sole justification is to save money or prevent inconvenience.¹⁹⁵ 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.¹⁹⁶ To support this finding, the court may question the minor outside of the courtroom with the prosecutor and defense counsel present.¹⁹⁷ If the court finds that the child is unable to testify in open court for one of the

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.

¹⁹⁰ 18 U.S.C. § 2423 (2003).

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).

¹⁹³ 18 U.S.C. § 3509(a)(2).

¹⁹⁴ CST Act, No. 105, pt. IIIA, div. 5, § 50EA (1994).

¹⁹⁵ *Id.* pt. IIIA, div. 5, § 50EA(d)(i).

¹⁹⁶ 18 U.S.C. § 3509(b)(1).

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.¹⁹⁸ The child is still subject to direct and cross-examination.¹⁹⁹

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,²⁰⁰ representatives from the U.S. Attorney's Office intend to physically transport witnesses from Cambodia if the case proceeds to trial.²⁰¹ In the case against Michael Hersh,²⁰² the child victims also testified at trial.²⁰³ 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.²⁰⁴ This right of confrontation has been interpreted to include four elements: a right to a "face-to-face meeting;"²⁰⁵ a guarantee that the witness will testify under oath, thus ensuring that the witness is cognizant of the matter's seriousness;²⁰⁶ a right to cross-examine the witness;²⁰⁷ and the ability of the jury to "observe the demeanor" of the witness to determine credibility.²⁰⁸

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.*

²⁰⁵ Maryland v. Craig, 497 U.S. 836, 844 (1990) (citations omitted).

²⁰⁶ *Id.* at 845-46, quoting California v. Green, 399 U.S. 149, 158 (1970).

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.²⁰⁹ The Court reasoned that the right to face-to-face confrontation, although important, is not required in every instance.²¹⁰ After this decision, the U.S. Congress enacted section 3509, and the Ninth Circuit Court of Appeals affirmed its constitutionality in 1993.²¹¹ 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."²¹² 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.²¹³ 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.²¹⁴ 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."²¹⁵ The International Association of

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).

²¹¹ *United States v. Garcia*, 7 F.3d 885 (1993).

²¹² *Craig*, 497 U.S. at 850.

²¹³ *Id.*

²¹⁴ Convention on the Rights of the Child, *supra* note 21.

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.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.²¹⁷

U.S. courts have consistently recognized the protection of a child's psychological and physical well-being as an important public policy interest.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.

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."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.²²⁰ Admittedly, the application of section 3509 to sex tourism victims located abroad was likely beyond the contemplation of the drafters.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

²¹⁶ INTERNATIONAL ASSOCIATION OF PROSECUTORS, MODEL GUIDELINES FOR THE EFFECTIVE PROSECUTION OF CRIMES AGAINST CHILDREN, IAP BEST PRACTICE SERIES NO. 2 (1999), available at <http://www.iap.nl.com/children.html> (last visited Nov. 6, 2003) [hereinafter MODEL GUIDELINES].

²¹⁷ *Id.*

²¹⁸ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). See also *Craig*, 497 U.S. at 853. 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 overcome a defendant's right to face his or her accusers in court") (Scalia, J., dissenting).

²¹⁹ *Craig*, 497 U.S. at 850.

²²⁰ 18 U.S.C. § 3509 (2003).

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.²²² Procedural requirements include the court's competency finding,²²³ the right of cross-examination,²²⁴ and the necessity that each witness swear to an oath.²²⁵ 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.²²⁶ Any attempt to obtain evidence in derogation of the foreign country's laws would infringe upon that country's sovereignty²²⁷ and potentially threaten diplomatic relations. In addition, such unlawful acts could result in the arrest or detention of participants, even American prosecutors.²²⁸

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.²²⁹ Until recently, letters rogatory were the most common method for obtaining evidence.²³⁰ The process was often slow²³¹ and aggravating.²³² The primary alternative to a

²²² See *infra* Part V.D.2.b.ii.

²²³ 18 U.S.C. § 3509(b)(1)(C) (2003).

²²⁴ *Id.* § 3509(b)(1)(D).

²²⁵ FED. R. EVID. 603.

²²⁶ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, OBTAINING EVIDENCE ABROAD, pt. C, available at http://travel.state.gov/obtaining_evidence.html (last visited Jan. 28, 2004) [hereinafter OBTAINING EVIDENCE].

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 prosecutors²³³ in obtaining evidence in foreign countries.²³⁴ 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.²³⁵ Whether using letters rogatory or MLATs, securing evidence from abroad takes time. Recognizing the probability of delay,²³⁶ Congress enacted provisions that suspend the statute of limitations²³⁷ and the requirements of the Speedy Trial Act in certain situations.²³⁸

Whatever the method used by prosecutors, foreign law still governs the acquisition of evidence abroad.²³⁹ 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.²⁴⁰ Some countries allow U.S. consular officers to administer oaths to witnesses in voluntary depositions taken in that country,²⁴¹ but the use of this technique is always subject to formal permission from the host country.²⁴² 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

OF STATE, BUREAU OF CONSULAR AFFAIRS, JUDICIAL ASSISTANCE: THAILAND, available at http://travel.state.gov/thailand_legal.html (last visited Jan. 28, 2004) [hereinafter JUDICIAL ASSISTANCE: THAILAND].

²³² Obtaining evidence via letters rogatory has been described as a “source of frustration to U.S. officials.” Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT’L LAW. 189, 189 (1985).

²³³ 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/mlat.html> (last visited Jan. 28, 2004) [hereinafter MLATs].

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL: STATUTE OF LIMITATIONS AND SPEEDY TRIAL ACT, tit. 9, § 272, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00272.htm (last visited Jan. 28, 2004).

²³⁷ 18 U.S.C. § 3292(a)(1) (2003). A district court may suspend the statute of limitations while awaiting evidence from a foreign country for up to three years. *Id.* § 3292(c)(1).

²³⁸ 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(h)(9). The clock stops for up to a year when there has been an official request for evidence from a foreign country. *Id.*

²³⁹ OBTAINING EVIDENCE, *supra* note 226, pt. C.

²⁴⁰ Ellis & Pisani, *supra* note 232, at 205.

²⁴¹ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, JUDICIAL ASSISTANCE: PHILIPPINES, available at http://travel.state.gov/philippines_legal.html (last visited Jan. 28, 2004).

²⁴² *Id.*

oath.²⁴³ Furthermore, an American attorney is not usually permitted to participate in any kind of Thai proceeding if testimony is compulsory.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.

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.”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.”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.²⁴⁷

The requirement that all witnesses in U.S. proceedings swear to an oath,²⁴⁸ a necessary element of the defendant’s right of confrontation,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.²⁵⁰

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

²⁴³ JUDICIAL ASSISTANCE: THAILAND, *supra* note 231.

²⁴⁴ *Id.*

²⁴⁵ *Id.* § 3509(b)(1)(C).

²⁴⁶ *Id.* § 3509(b)(1)(D).

²⁴⁷ *See supra* Part V.D.2.b.i.

²⁴⁸ FED. R. EVID. 603.

²⁴⁹ *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990), quoting *California v. Green*, 399 U.S. 149, 158 (1970).

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.²⁵¹ A child can only give evidence under oath if the court deems the child competent to understand the nature of the oath.²⁵² If the court does not make this finding, the child can still testify, without swearing to an oath.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.

²⁵¹ Evidence Act, 1995, s. 13 (Austl.). See also John E.B. Myers, *SYMPOSIUM: CHILD ABUSE: A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 Pac. L.J. 169, 188 (Fall 1996).

²⁵² Evidence Act, 1995, s. 13 (Austl.). But see Sandra Shrimpton et al., *The Child Witness and Legal Reforms in Australia*, in *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).

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 Penh, the Australian Federal Police, the Joint Transnational Crime Investigation Team, and two NGOs.²⁵⁴ 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,²⁵⁵ 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.*

²⁵⁵ The U.S. Department of Homeland Security's Bureau of Immigration and Customs Enforcement (BICE) recently launched a new initiative, "Operation Predator," to "protect children world-wide." Press Release, U.S. Dep't of Homeland Security, Fact Sheet: Operation Predator, (July 9, 2003), available at <http://www.dhs.gov/dhspublic/display?theme=43&content=1067> (last visited Nov. 9, 2003). Included in its priorities is an effort to increase cooperation and communication with foreign law enforcement partners in investigating child-sex tourism crimes. *Id.* Operation Predator was credited with the arrest of John Seljan in Los Angeles. 85 Year Old Man Charged, *supra* note 114. See *supra* Part III.B.1 for more about Seljan. Australia had a similar investigation unit, "Operation Morocco," responsible for investigating child-sex tourism overseas. People's Recovery, Empowerment and Development Assistance Foundation, Inc., Operation Morocco Disbanded (2000), available at <http://www.preda.org/archives/research/ccpat001207.html> (last visited Jan. 22, 2004). However, in 2000 the Australian Federal Police disbanded the unit. *Id.* Child advocates were alarmed at the move, arguing that given the complexity of child-sex tourism, specialized skills and training are needed for proper investigation. *PM: Child Sex Unit to Disband* (ABC radio broadcast, Nov. 7, 2000) available at <http://www.abc.net.au/pm/s209426.htm> (last visited Jan. 22, 2004).

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.²⁵⁶ 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.²⁵⁷ 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

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 paraphiliac 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.