September 2, 1999

By Email and fax

Bill Wareham, Executive Director
Lisa Matthaus, Forest Policy Analyst
Sierra Club of BC
576 Johnson Street
Victoria, BC V8W 1M3

Dear Lisa and Bill:

Re: Proposed Acquisition of MacMillan Bloedel by Weyerhaeuser - NAFTA chapter 11 Implications

The BC Minister of Forests must consent to the change of control of MacMillan Bloedel Limited contemplated by the June 20, 1999 merger agreement between Weyerhaeuser Company, MacMillan Bloedel Limited, and a BC subsidiary of Weyerhaeuser. The following legal opinion addresses the implications of the North American Free Trade Agreement (the "NAFTA"), Article 1110: Expropriation and Compensation, for BC forest law and policy, should the merger occur. I have not analysed the implications of other NAFTA provisions.

ISSUES

1. If the merger goes through, would Weyerhaeuser Company be in a position to invoke the expropriation and compensation provisions of Chapter 11 of NAFTA?
2. What types of government action could be considered expropriation or tantamount to expropriation of an investment, and thus give rise to a NAFTA challenge?
3. How does the process for resolving a claim for compensation under NAFTA differ from BC procedures?
4. On the basis of NAFTA considerations, should the Sierra Club of BC oppose the change of control over MacMillan Bloedel Limited?

Facts

I have based my opinion on the following facts:

1. MacMillan Bloedel Limited ("MB") is a corporation incorporated under the federal *Canada Business Corporations Act*.
2. Weyerhaeuser Company ("Weyerhaeuser") is a corporation incorporated in the state of Washington.
3. 586474 B.C. Ltd. ("Weyerhaeuser NewCo") is a BC company that is a wholly owned subsidiary of Weyerhaeuser.
4. 586476 B.C. Ltd. ("WeySub") is a BC company that is a subsidiary of Weyerhaeuser NewCo.
5. On June 20, 1999 Weyerhaeuser, Weysub, and MB entered into a merger agreement to the following effect:

a. Weysub will acquire all the outstanding shares in the capital of MB according to a plan of arrangement under the *Canada Business Corporations Act*.
b. In exchange, MB shareholders will receive either 0.28 Weyerhaeuser Common Shares for each of their MB shares, or 0.28 non-voting exchangeable shares in Weysub. Each of these Weysub shares will be exchangeable for one Weyerhaeuser common share.
c. The obligations of MB, Weyerhaeuser and Weysub under their merger agreement are conditional on, among other things, obtaining required approvals from government.

1. MB holds at least four replaceable forest licence agreements (two in partnership), two tree farm licences and 263 timber licences which, in total, allow MB to cut 5.6 million cubic metres of wood annually on BC Crown land.
2. MB holds processing facilities in Canada, including three containerboard mills, three oriented strand board mills, three saw mills and six lumber mills.
3. When Weysub acquires all the shares in MB, it will acquire all the assets and liabilities of MB, including its tree farm, forest and timber licences. As a result, the change in control of MB requires approval from the Minister of Forests.

These facts are based on publicly available documents, including documents filed with the BC Securities Commission and the US Securities and Exchange Commission. If you learn of other relevant facts please let me know immediately. New information could change my opinion.

Analysis

There has yet to be any arbitral or judicial consideration of the NAFTA expropriation and compensation provisions. These rules are really unprecedented; their only analogue is in certain bilateral investment agreements. I have set out what I consider the most likely interpretations of these provisions; however, we simply cannot predict with certainty how a claim under Chapter 11, Article 1110 of NAFTA will be resolved. We can, however, appreciate how very broadly framed the rights given to foreign investors by NAFTA are, and the extreme consequences if an investor such as Weyerhaeuser were successful in a claim under Article 1110 of NAFTA.

1) If the merger goes through, would Weyerhaeuser be in a position to invoke the expropriation and compensation provisions of Chapter 11 of NAFTA?

In order to answer this question I have examined the wording of Article 1110 of NAFTA: Expropriation and Compensation, and broken it down into the various criteria that would bring Article 1110 into play. In my opinion, if the merger goes through, Weyerhaeuser would be the type of investor who would be in a position to invoke the expropriation and compensation provisions of Chapter 11 of NAFTA.

Article 1110 of NAFTA reads:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

a. for a public purpose;
b. on a non-discriminatory basis;
c. in accordance with due process of law and Article 1105(1); and
d. on payment of compensation in accordance with paragraphs 2 through 6.

Article 1139 of NAFTA provides that an "investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party."

Are Weyerhaeuser or Weysub investors of another Party, namely the United States, in Canada's territory?

An "investor of a Party" is defined in NAFTA to mean "a Party or a state enterprise thereof, or a national or an enterprise of such a Party, that seeks to make, is making or has made an investment."

A corporation is considered an enterprise. The criterion for being considered an "enterprise of a Party" is that the enterprise is constituted or organised under the law of a Party. Thus, a company incorporated under the laws of a U.S. state is an enterprise of the U.S.

As a company incorporated in Washington state, Weyerhaeuser is clearly an investor of the U.S.

Weysub is a numbered company incorporated under BC law. Based on the NAFTA definitions, it is not an enterprise of the U.S., and thus not an "investor of a Party."

Will the assets, including MB's timber tenures, acquired through the merger be "owned or controlled directly or indirectly by an investor of the U.S."?

Weysub is currently a wholly owned subsidiary of Weyerhaeuser NewCo., which in turn is a wholly owned subsidiary of Weyerhaeuser. Although the words "control" and "subsidiary" are not defined in the NAFTA, definitions of control in Canadian law generally focus on the capacity of a person or group of people (which includes corporations) to have the voting power to elect a majority of directors or to otherwise effectively control the operations and direction of the company.

There is little question that investments of a subsidiary, the voting shares of which are wholly owned by a parent company, are directly or indirectly controlled by the parent, in this case Weyerhaeuser.

I have analysed whether issuing exchangeable Weysub shares to MB shareholders through the Plan of Arrangement will change this situation. In my opinion it does not.

First, the exchangeable Weysub shares are non-voting. Without any vote to elect directors or control the direction of the company, the former MB shareholders would have little control over Weysub.

Second, in the merger agreement, Weyerhaeuser and Weysub agree to enter into a Voting and Exchange Trust Agreement. The Agreement provides an indirect mechanism for holders of the exchangeable Weysub shares to influence the affairs of Weysub, but does not change the fundamental control over Weysub exercised by Weyerhaeuser. According to the Voting and Exchange Trust Agreement Weyerhaeuser will issue one "Special Voting Share" to a Canadian trustee, who will exercise one vote on behalf of each of the Weysub exchangeable shareholders. However, through the trustee, Weysub shareholders will only be able to vote at meetings of holders of Weyerhaeuser common shares; they cannot directly elect their own directors of Weysub.

Thus, even if it is Weysub who holds the MB shares and thus its timber tenures, in my opinion the tenures are controlled directly or indirectly by Weyerhaeuser, who is an investor of the U.S.

What would constitute an "investment" under NAFTA in the context of the Weyerhaeuser acquisition of MB?

The definition of investment in NAFTA is very broad. There are at least two parts of it that are relevant in the context of the Weyerhaeuser acquisition of MB.

First, the meaning of investment includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." For example, investments in mills and equipment for all stages of harvesting and processing timber for profit would be covered by this portion of the NAFTA definition of investment. In my opinion, rights to harvest timber granted through the tenure system would also be included in this definition.

There is a legal distinction between real property (e.g. real estate), and personal property (e.g. personal possessions (chattels). Licences are generally considered personal property. Including both "real estate" and "other property" indicates that the NAFTA definition of "investment" includes personal property. There is some legal precedent that indicates that timber tenures such as timber licences and tree farm licences are licences coupled with a real property interest called a "*profit a prendre*" – the right to enter on to the land of another and exploit some of the profits of the soil. However, even if timber tenures were only considered bare licences, i.e. personal property, the definition of investment is broad enough to include them.

Both MB and Weyerhaeuser are integrated forest products companies that aim to profit from their investments in forestry operations in BC; for them acquiring timber tenures and using these rights to harvest timber is an investment "for the purpose of economic benefit."

Thus, in my opinion, the acquisition of timber tenures and the use of the rights granted under them to harvest timber, are investments within the definition of Chapter 11 of NAFTA.

Second, pursuant to NAFTA, investment also means "an enterprise" and "an interest in an enterprise that entitles the owner to share in the income or profits of the enterprise." In this interpretation, ownership of the Canadian subsidiaries of Weyerhaeuser and the incomes and profits from these companies, would themselves be considered the "investment."

This appears to be a common definition of "investment" invoked in NAFTA challenges.

For example, Pope and Talbot, Inc. a corporation incorporated under the laws of the State of Delaware, recently submitted "Notice of Intent to Submit A Claim to Arbitration" under Chapter 11 of NAFTA. The corporate structure through which Pope and Talbot operates in Canada is parallel to the relationship between Weyerhaeuser, Weyerhaeuser NewCo and Weysub. In Pope and Talbot's case, the U.S. company wholly owns Pope and Talbot International Ltd. a BC company, who in turn wholly owns Pope and Talbot Ltd. another BC company. In the Pope and Talbot case, the claim asserts that the BC subsidiary is itself an investment of the U.S. parent.

Thus, any actions affecting the profitability of the BC incorporated subsidiaries of Weyerhaeuser, as investments of a U.S. company, could be the basis of a NAFTA challenge.

2) What types of government action could be considered expropriation or tantamount to expropriation of an investment, and thus give rise to a NAFTA challenge?

Based on the above analysis, if Weyerhaeuser gains control over MB's timber tenures through the merger, Chapter 11 of NAFTA would apply to future government action that affects these rights in a manner that is considered expropriation, or tantamount to expropriation.

Likewise, all other operations of MB, such as processing facilities, now controlled by Weyerhaeuser would also be investments owned or controlled directly or indirectly by an investor of the U.S. Thus, government action affecting these rights in a manner that is considered expropriation, or tantamount to expropriation would also be open to challenge.

In addition, based on the broad definition of investment, virtually any activity that reduces the profitability of the Weyerhaeuser subsidiaries carrying on business in BC could be caught by Article 1110 of NAFTA.

I have split my analysis of this question into two parts. First, I have examined the implication of government action that affects timber tenures. As noted above, government action that affects property controlled directly or indirectly by Weyerhaeuser in BC is caught by Article 1110. Second, I have examined the implications of government action that affects profits and income from subsidiaries of a U.S. company operating in Canada, which may also be caught by the broad NAFTA definition of investment. Finally, I have provided some examples of claims that have already been made by foreign investors under the expropriation and compensation provisions of NAFTA

a) Timber Tenures:

What does Article 1110 mean for tenure reform, the honourable settlement of the First Nations' land question and completing our protected areas system?

In my opinion, if government did any of the following, Weyerhaeuser could claim compensation under Article 1110 of NAFTA, on the basis that the government had expropriated its property (namely its rights to harvest timber granted through timber tenures) or that its actions were tantamount to expropriation:

- created protected areas, including provincial parks, ecological reserves and designations under the *Environment and Land Use Act*, involving any Crown land under licence to Weyerhaeuser or its subsidiaries;
- created critical wildlife areas under the *Wildlife Act* involving any Crown land under licence to Weyerhaeuser or its subsidiaries;
- settled First Nations treaties involving any Crown land under licence to Weyerhaeuser or its subsidiaries;
- established resource management zone objectives (e.g. special management zones) and landscape unit objectives (e.g. forest ecosystem networks or old growth management areas) under the Forest Practices Code that had the effect of reducing the cut levels of Weyerhaeuser or its subsidiaries;
- did not replace Weyerhaeuser's licenses when they came due for replacement but rather let them run their full term (this could occur as part of an initiative to reallocate the land or volume to communities when the licences expired);
- reduced the allowable annual cut for a timber supply area, and the allowable annual cut for licensees in it under section 63 of the *Forest Act*, in order to redistribute the volume to other individuals, communities or companies;
- reduced, through the Timber Supply Review process, the annual allowable cut for Weyerhaeuser's tree farm licences, or timber supply areas where Weyerhaeuser holds forest licences.

How is Weyerhaeuser's position different under NAFTA than under Canadian law?

In Canadian law, the Crown retains the right to take away a person's property without compensation, provided it does so explicitly through legislation. This is the case even in a situation where a private property interest in land is affected, and is certainly the case when Crown forest resources are reallocated.

The *Forest Act*, contains multiple examples where out provincial government has exercised this authority. In particular, section 80 of the *Forest Act* sets out a number of situations where compensation is not payable, including proportionate reductions in annual allowable cut for forest licensees (section 63), and reductions in annual allowable cut when a licensee fails to live up to various environmental, utilisation, and processing obligations (see sections 69-71). Furthermore, section 60 provides that minister may, according to a procedure outlined in the *Forest Act*, delete up to 5% of the volume or area of a license without compensation.

Likewise, the *Forest Act* specifies that no compensation is payable when the chief forester determines the annual allowable cut every 5 years through the Timber Supply Review process.

In addition, many groups have strongly urged the government to rethink its compensation policy and to use its authority to legislate in this area to limit the amount of compensation payable when Crown resources held under licenses are reallocated.

Article 1110 of NAFTA contains none of these limitations. NAFTA would allow Weyerhaeuser, as a U.S. company with investments in Canada, to claim compensation in situations where none would be payable to a Canadian company. Although NAFTA contains reservations for some domestic laws, there are no reservations from the expropriation and compensation provisions in Chapter 11 that would allow the BC government to maintain the statutory limitations on compensation in the *Forest Act*.

Furthermore, the effect of NAFTA is to place a major limitation on the provincial government's capacity to effectively legislate in an area otherwise entirely within its jurisdiction. In other words, even if new compensation legislation were to limit the compensation payable when parks were created, treaties settled, or tenure redistributed, Weyerhaeuser could circumvent Canadian law by seeking redress under NAFTA. NAFTA provides that compensation "shall be equivalent to the fair market value of the expropriated investment."

Recent NAFTA challenges demonstrate that companies are also seeking compensation in situations that would merely be considered regulation, not expropriation in Canadian law. In general, before expropriation is said to occur in Canadian law, the value of the property expropriated must be reduced to zero, and there must be a corresponding acquisition of that value by the government. Short of this, government may legitimately affect property rights through regulation. A classic example is a zoning by-law. In claims brought to date, the concepts of "indirect" expropriation, and measures "tantamount to expropriation" in the NAFTA expropriation provisions have been given a very broad interpretation by foreign investors – an interpretation that goes beyond what would be compensable under domestic law (see examples below).

This situation is particularly apparent when you consider the broader definition of investment in NAFTA, i.e. that Weyerhaeuser's subsidiaries are themselves the investment.

b) Weysub as an Investment:

What does NAFTA Article 1110 mean for government action that affects profits and income from subsidiaries of Weyerhaeuser operating in Canada?

The potential scope of claims under Article 1110 is dramatically larger than in Canadian law by virtue of the inclusion of an "enterprises" and "an interest in an enterprise that entitles the owner to share in the

income or profits of the enterprise." Most of the claims brought to date by investors under the expropriation and compensation provision of NAFTA make broad allegations about impacts of government action on the profits of their "investment" – namely their subsidiary operating in Canada, without specifying any particular property (e.g. particular assets or contracts) that has been "expropriated."

For example, claims contain allegations that government action has: inhibited the ability of the company to carry out its operations, affected its sales of a product, reduced the value of the company's capital investments, required the company to reduce operations to comply with government regulation, or increased costs so as to make the company's business unprofitable. These activities are alleged to be an "expropriation" or "tantamount to expropriation" of the other Party's investment, in that they affect the value or profitability of the investor's Canadian operations.

The claims made to date demonstrate that investors are interpreting Article 1110 as a guarantee of compensation when government regulation affects corporate profits.

This is far beyond the scope of a compensable expropriation in Canadian law, where it has long been established that regulation, provided it does not completely eliminate the value of property, is not compensable. Compensation for lost profits is sometimes awarded, but only where it flows directly from the loss of property such as land or an interest in land. Furthermore, there is the additional requirement in domestic law that the government must acquire the property. For example, where property is expropriated for building a highway or a park, the government acquires it for its own use for public purposes. The latter feature is notably absent from NAFTA expropriation claims that have been made to date.

Experience with other claims made under Article 1110 indicates that Weyerhaeuser could conceivably seek compensation for virtually any government action that reduces the operations or profits of its Canadian subsidiaries, in any part of its licence areas, or in relation to any of its processing facilities. However, experience also demonstrates that such a claim would become more likely as the reduction in the value of its investment approached 100 percent. The claims made to date involve factual situations much broader than those that would require compensation in Canadian law. This may open the government to claims for compensation in situations previously considered merely "regulation" of forest practices, whether because regulation removes areas from the operable land base (e.g. riparian protection around streams) or increases the costs of harvesting (e.g. the Forest Road Regulation), to the point where Weyerhaeuser could argue its BC operations were no longer profitable.

I note that Weyerhaeuser Canada, another wholly owned subsidiary of Weyerhaeuser Co. already has operations in BC; thus the change in Weyerhaeuser's rights under NAFTA is incremental. In some cases Weyerhaeuser's claim for compensation would be larger if legislation or regulation would now affect both Weyerhaeuser's new and old operations. Alternatively, regional or local impacts of government action, may give rise to NAFTA challenges that would not have been open to Weyerhaeuser but for the change in control (and thus the acquisition of new tenures and processing facilities).

No claim under the expropriation provision of Chapter 11 has proceeded to arbitration. It remains to be seen whether an arbitration panel will give effect to any of the current claims for compensation under Article 1110. However, past experience with decisions under other articles of NAFTA and the WTO is that regulation for environmental or social purposes is virtually always overturned where it conflicts with corporate interests. This past experience was a factor in Canada's decision in the Ethyl case to settle before the hearing - for 13.4 million US (close to 20 million Canadian) and the revocation of the offending law. Furthermore, if a challenge is made there will be significant (in the millions of dollars range) legal costs to defend the claim whether or not the investor is successful.

c) Examples of Claims to Arbitration under the Expropriation and Compensation Provisions of NAFTA

Some insight into the type of government action that may give rise to a NAFTA challenge can be found by examining the claims that have been made.

In *S.D. Meyers v. Canada*, S.D. Meyers an Ohio corporation, claimed that a Canadian ban on the export of PCB's deprived it of the benefits of its investment in Canada in a manner that was tantamount to expropriation. Prior to the export ban, S.D. Meyers planned to process, distribute and treat PCB-contaminated waste from Canada at facilities in the U.S. Rather than focusing on the specific property interfered with, S.D. Meyers' claim contains vague references to the impact of Canada's actions "on the business operations of S.D. Meyers" and "Canada's measures depriving the Investor of its ability to carry out its otherwise legal business operations." No specific contracts or facilities are referred to.

S.D Meyers is seeking an award of US $20 million to compensate it for its losses including: lost sales and profits, loss of value of its investment in its joint venture with S.D. Meyers (Canada) Inc., the cost of reducing operations in Canada; and the legal and other professional expenses to attempt to overturn the PCB export ban.

In *Methanex v. United States*, Methanex Corporation, a Vancouver based producer of methanol, seeks close to a billion dollars in damages from the U.S government. According to its notice of intent to submit a claim under NAFTA, Methanex's investment is its indirect ownership of Methanex Menthanol Company, a Texas partnership that sells methanol to third parties in the U.S to produce methyl tertiary-butyl ether (MTBE). The State of California has taken legal steps to require the removal of MTBE from gasoline. Methanex's notice of intent alleges that

> The measures taken by the State of California Legislature and the Governor have and will end Methanex US' business of selling methanol for use in MTBE in California. This constitutes a substantial interference and taking of Methanex US' business and Methanex's investment in Methanex US. These measures are both directly and indirectly tantamount to expropriation.

It is interesting to note that only 40% of Methanex US' sales of methanol in the U.S. are for the production of MTBE, and it is unclear what percentage of these sales are in California. Clearly, the measures taken in California have not reduced the value of Methanex's investment to zero.

In *Ethyl Corp. v. Canada* the Canadian federal government recently settled a similar claim arising out of its prohibition on the import and interprovincial transport of a maganese based fuel additive (MMT). In 1996 the federal government passed Bill C-29 based on concerns about threats to the environment and human health. Virginia based Ethyl Corp. manufactures MMT in the US and processes it at a factory in Sarnia, Ontario. Ethyl alleged that the ban would reduce the value of Ethyl's MMT Canadian plant, hurt its future sales and harm its corporate reputation. Ethyl claimed that the ban "expropriated" its investment in Canada, as it could no longer carry on business, and sought $250 million US in damages. Last year the Canadian government settled the claim for $13.4 million US, including compensation for Ethyl's lost profits and legal fees, reversed the ban, and issued an apology.

A similar claim arose in *Marvin Kappa v. Mexico*. In order to promote the export of Mexican products, Mexican law permits the rebates of consumption taxes on exports, including the excise taxes on processed tobacco. However, amendments to the law have focused on allowing rebates only for actual producers/manufacturers of tobacco, not for resellers. As a result, the Mexican government refused to rebate the excise tax to a Mexican incorporated tobacco export company, wholly owned by Kappa, a U.S. national. Kappa claims that the failure to rebate the excise tax was a "confiscatory tax measure" resulting in the "intentional destruction of CEMSA's export business," and was thus tantamount to expropriation.

I note that other claims that have been made under Chapter 11, such as *Sun Belt Water, Inc. v. Canada*, and *Pope & Talbot, Inc. v. Canada*, do not invoke the expropriation and expropriation provision, but rather provisions dealing with things such as national treatment and most-favoured nation treatment. However, all these claims are proceeding through the same dispute resolution process.

3) How does the process for resolving a claim for compensation under NAFTA differ from BC procedures?

In Article 1122 of NAFTA, Canada has unilaterally consented to binding international arbitration in every case that a foreign investor submits a claim under chapter 11, no matter how ill founded or frivolous the claim may be.

Unless the parties agree otherwise, the decision-maker is a Tribunal made up of four arbitrators, only one of which must come from Canada. The provisions of NAFTA dealing with this dispute resolution process are often referred to as the "investor-state suit provisions" because they allow foreign investors to challenge actions of nation-states.

Article 1131 on NAFTA specifies that the Tribunal shall apply international law, rather than Canadian law to resolve the issues before it. As a result, if Weyerhaeuser were to bring a challenge under NAFTA, disputes about BC forest policy and law, including tenure reform, would be removed to an international forum where government action will be judged by standards that may be quite different from Canadian law.

There have been international norms for international dispute arbitration for decades, however it is only since the mid-1980s that Canada has adhered to them at all. Furthermore, NAFTA took rules developed to deal with commercial disputes between private parties, and extended them to disputes arising out of government action. Traditionally, only national governments were able to invoke dispute resolution processes under international trade agreements; NAFTA allows investors of a Party to do so.

From a procedural perspective, claims under NAFTA are governed by the arbitration rules of the United Nations Commission on International Trade Law (UNICENTRAL) Rules. Perhaps the most significant aspect of these Rules is that they provide that unless the parties agree otherwise, all hearings shall be held *en camera*. In other words they are completely confidential and closed to the public. Furthermore, neither the UNICENTRAL Rules, nor NAFTA provide for a mechanism for public interest groups, or other people who will be affected by the decision, to make submissions. Only the award of the Tribunal can be made public, and only then at the discretion of a party to NAFTA or a disputing investor.

It is also significant that under NAFTA and the UNICENTRAL rules there is no doctrine of precedent or *stare decisis*. In other words, even if on Tribunal were to determine that government action did not amount to compensable expropriation in one situation, there is no guarantee that the same decision would be made in a subsequent claim involving similar facts.

By way of contrast, claims for compensation arising from an alleged expropriation under domestic law would be adjudicated by our regular court system. Unless a specific order is made otherwise, all courts in BC, when in session, are open to the public, including the media. The documents setting out the specifics of a party's claim and the government's defence would be publicly available through the court registry. Public interest groups or other persons affected by the dispute could apply to "intervene" and make written or oral submissions on certain issues. A decision at the level of our BC Supreme Court could also be appealed to the BC Court of Appeal and eventually to the Supreme Court of Canada if an error of law was made by the judge at first instance. All these proceedings are open to the public, and judges' decisions are available almost immediately electronically and in printed form. A record of the proceedings can be obtained, though at a cost. In our judicial system the doctrine of precedent or *stare decisis* also provides some assurance that like cases will be decided alike, and that one can look to a body of jurisprudence, or judges' decisions, to assist in interpreting the law.

In my opinion, from the perspective of accountability, transparency, openness, and democratic process, the forum for the resolution of disputes under NAFTA falls far short of the Canadian judicial process.

4) On the basis of NAFTA considerations, should the Sierra Club of BC oppose the change of control over MacMillan Bloedel?

It is my understanding that the Sierra Club considers it important for British Columbia to complete its protected areas system, honourably settle the First Nations' land question and redistribute control over our forests in ways that create new opportunities for BC communities.

In my opinion Minister of Forests' consent to the Weyerhaeuser acquisition of MB will create a NAFTA liability that will impede the realisation of these objectives:

NAFTA would allow Weyerhaeuser to seek compensation in situations where none would be payable to a Canadian company, or in greater amounts. In particular, NAFTA would create obstacles for reducing the cut on lands controlled by Weyerhaeuser. NAFTA also puts major limitations on the provincial government's capacity to effectively legislate in areas otherwise entirely within its jurisdiction.

Furthermore, should a NAFTA claim be made, the dispute will be resolved through a secretive process with no opportunity for public interest groups or people affected by the decision to be heard.

Although there has not yet been any arbitral or judicial interpretation of Chapter 11, Article 1110 of NAFTA, in my opinion, the course of prudence is to avoid the risk and uncertainty created by the very broadly framed rights given to foreign investors by this provision. In my opinion, on the basis of potential NAFTA liabilities, the Sierra Club of BC should oppose the change in control of MB.

Please feel free to contact me if you have questions arising from this opinion.

Sincerely,

Jessica L. Clogg
Barrister and Solicitor