Exceeding Domestic Standards: The gap between treaty protections and protections under US law

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US Law: When will a court find that the government has given an investor/company an enforceable right to be protected against general regulatory change?

1. The promise to waive future legal powers/protect the investor against future legal change must have been *clearly* and *unmistakably* made.

2. The government must have actually *intended* to make that promise.

3. The promise must have been made by an official who had the *actual authority* to make it.

4. The promise must *be substantively and procedurally legal*.

5. Generally *no rule of estoppel* against the federal government.
## US courts v. Investment tribunals

<table>
<thead>
<tr>
<th>Principle</th>
<th>Requirement under US law?</th>
<th>Requirement imposed by investment tribunals?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promise must be clear and unmistakable</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Government must have intended to make the promise</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>The promise must have been made by an official with the actual authority to make it</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>The promise must be substantively and procedurally legal</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Estoppel is allowed against the government</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Research Question

Question: Do decisions by investment tribunals grant investors substantive rights that go beyond what they have under US domestic law?

Answer: Yes

For additional information, see:
