

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

Principle	Requirement under US law?	Requirement imposed by investment tribunals?
Promise must be clear and unmistakable	Yes	No
Government must have intended to make the promise	Yes	No
The promise must have been made by an official with the actual authority to make it	Yes	No
The promise must be substantively and procedurally legal	Yes	No
Estoppel is allowed against the government	No	Yes



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:

Lise Johnson and Oleksandr Volkov, "State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law," *Investment Treaty News*, IISD, Volume 5, Issue 1, January 6, 2014.

Lise Johnson and Oleksandr Volkov, "Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law," *The American Review of International Arbitration*, Volume 24, No 3, 2013, pp. 361-415.

