

## The Application Of The Principle Of Legal Certainty In Foreign Investment In Aceh

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**Abstract:** This study aims to explain the application of the principle of legal certainty in foreign investment in Aceh. This study uses a normative juridical method with a statutory approach, a historical approach and a conceptual approach. The results of the study indicate that the application of the principle of legal certainty in the implementation of legislation regarding foreign investment in Aceh has not been following the objectives of the legislation. The Government of Aceh as the organizer of investment, has not been able to carry out its obligations in protecting investors' assets. It does not provide certainty about the sustainability of investment activities. In addition, investors have not fulfilled their obligations, especially in empowering local workers, transferring technology, and cooperating with small and medium enterprises. The application of the ideal principle of legal certainty in the regulation of foreign investment in Aceh will meet several criteria, namely: a) There is a synchronization of arrangements both vertically and horizontally; b) establishing norm regarding the investment that is effective and not multi-interpreted; c) the norm regarding foreign investment has validity concerning its validity; d) the norms can be implemented following the needs and objectives of investment, and e) its regulation in Aceh Qanun and Regency/City Qanun does not conflict with higher regulations.

**Keyword:** Principle of Legal Certainty, Foreign Investment, Aceh Province

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Date of Submission: 15-07-2022

Date of Acceptance: 31-07-2022

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### I. Introduction

In the context of regional autonomy and decentralization, the implementation of investment is carried out by the central government and the provincial and district/city governments following their respective authorities. The implementation of investment in Aceh Province is carried out by the provincial government and district/city governments, who are given various tasks and authorities according to their positions based on the principle of special autonomy.<sup>1</sup>In reality, the realization of investment in Aceh shows a fluctuating condition of the target set. Therefore, for 2018 and 2019, the realization of investment value, both through domestic and foreign investment, is still far from the target value set.<sup>2</sup>As for 2020, the realization of investment value exceeds the set target but is still dominated by domestic investment. For 2021, investment realization in the second quarter (April-June) 2021 has reached Rp. Six thousand four hundred eighty-nine trillion or 97.58 percent of the target is Rp. 6,650 trillion, which is dominated by domestic investment.<sup>3</sup>

One aspect that is sufficient to influence investment in an area is the rule of law. The need for a legal function to predict (predictability) the consequences of the steps and policies taken affect economic relations and corporate strategy in carrying out the competition in the business world.<sup>4</sup>In addition, aspects of fairness,

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<sup>1</sup>Aceh's special autonomy in the local government legal literature is known as asymmetric decentralization. Debora Sanur L, "Implementasi Kebijakan Otonomi Khusus Aceh", *Jurnal Politica* Vol. 11, No. 1, Mei 2020, page. 68.

<sup>2</sup>The Government of Aceh has made changes to regulations regarding investment with the establishment of Aceh Qanun Number 5 of 2018 concerning investment which is an update to Qanun Number 4 of 2013 concerning Amendments to Aceh Qanun Number 5 of 2009 concerning investment.

<sup>3</sup>The investment value in Aceh is still lagging behind other provinces in Sumatra. See <https://www.bps.go.id/indicator/13/1840/1/realisasi-investasi-penanaman-modal-luar-negeri-menurut-provinsi.html>, and <https://www.bps.go.id/realisasi-investasi-penanaman-modal-dalam-negeri-menurut-provinsi-investasi>, Accessed on November 5, 2021.

<sup>4</sup>Arfan Faiz Muhlizi, *Penataan Regulasi Dalam Mendukung Pembangunan Ekonomi Nasional*, *Jurnal Rechtsvinding* Volume 6, No. 3, Desember 2017, page. 355.

such as equal treatment and standard patterns of government behavior, are needed to maintain market mechanisms and prevent excessive bureaucracy. So, through a legal and regulatory system that can provide protection, it will create certainty (predictability), fairness (fairness), and efficiency (efficiency) for investors to invest their capital.<sup>5</sup>

The regulatory framework for investment in Aceh Province has been regulated explicitly in Law Number 11 of 2006 concerning the Government of Aceh (after this abbreviated as UUPA). The UUPA exists as a special law (*lex specialis*) within the framework of regional autonomy, which regulates the main points of governance in Aceh.<sup>6</sup> Investment arrangements in UUPA are regulated in Article 165 paragraphs (1), (2), and (3), which state that:

1) Residents in Aceh can trade and invest internally and internationally following the laws and regulations;

2) The Aceh government and district/city governments, following their respective authorities, can attract foreign tourists and issue permits related to investments in the form of domestic investment, foreign investment, exports, and imports by taking into account the norms, standards, and procedures that apply nationally;

3) The Aceh government and district/city governments, following their respective authorities and based on nationally applicable norms, standards, and procedures, have the right to provide: a). general mining exploration and exploitation permits; b). forest area conversion permits; c). fish are catching permits at most 12 nautical miles measured from the coastline towards the high seas and/or towards archipelagic waters for the province and one-third of the area of authority of the province for the district/city; d). permits for operational use of fishing vessels of all types and sizes; e). permit to use surface water and sea water; f). permits related to forest management and exploitation; and g). local operator license in the telecommunications sector.

The provisions of the UUPA give authority to the Aceh Government and districts/cities to issue investment permits for both domestic and foreign investors. The regulation on investment in the UUPA aims to create conducive investment by regulating various essential aspects, such as basic investment policies, the form of business entity, treatment of investors, business fields, licensing, institutional coordination, implementation of investment affairs, and provisions on settlements. To implement these provisions, regulations were formed at various levels, one of which is Aceh Qanun Number 5 of 2018 concerning investment (hereinafter abbreviated as Aceh Qanun Number 5 of 2018).<sup>7</sup> The regulation on investment aims to provide legal certainty. This is based on the provisions of Article 3 paragraph (1) letter e of the Aceh Qanun on Investment which states that "investment policy in Aceh is directed at ensuring security and legal certainty in doing business for investment from the licensing process until the end of investment activities following the provisions of the law/legislation." The direction of policies and regulations regarding investment, especially foreign investment in Aceh, has not provided legal certainty.<sup>8</sup> Article 4 paragraph (2) of the Aceh Qanun on Investment expressly states that the Aceh Government protects and guarantees the civil rights of investors who have invested in Aceh while protecting the community's civil rights by following the laws and regulations. However, in the context of foreign investment in Aceh, there are various cases of investment failure caused by the absence of legal certainty. For example, in the case of PT Semen Indonesia Aceh's (PT SAI) investment failure in Laweung, the Aceh Government has not been able to resolve legal issues related to the investment plan, such as land disputes.<sup>9</sup> In addition, institutionally, the Aceh Government Work Unit (SKPA) assigned the tasks and functions of licensing and investment also changed in line with adjustments to the national investment institutions. As a result, the institutional changes in

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<sup>5</sup>ErmanRajagukguk, *Hukum Investasi di Indonesia*, Jakarta: FH Universitas Al-Azhar, 2007, page. 27-31.

<sup>6</sup>Husni Jalil (et.al), *Implementasi Otonomi Khusus di Provinsi Aceh Berdasarkan Undang-Undang Nomor 11 Tahun 2006*, *Kanun Jurnall Ilmu Hukum* No. 51, Agustus 2010, page. 209.

<sup>7</sup>Aceh Qanun Number 5 of 2018 concerning investment is the result of the development of Qanun Number 4 of 2013 concerning Amendments to Aceh Qanun Number 5 of 2009 concerning Investment which is considered no longer following the development of the investment world.

<sup>8</sup>Ismail Rasyid stated that the performance of the Aceh Government's PT Pembangunan Aceh (PEMA), which was considered unclear in following up on PT Trans Continent's desire to build essential infrastructure at KIA Ladong. See <https://www.popularitas.com/berita/pt-trans-continent-hengkang-dari-kia-ladong/>, accessed on November 5, 2021.

<sup>9</sup>The existence of legal uncertainty and unreliable delegation caused the investment agreement between Aceh and the UAE to be canceled. See <https://dialeksis.com/aceh/delegasi-tak-handal-penyebab-mou-investasi-aceh-uea-gagal/>, accessed on November 10, 2021.

the SKPA in the investment sector have caused legal uncertainty, and licensing for investment does not work effectively.<sup>10</sup>

In addition, one of the problems that affect legal certainty in the implementation of foreign investment in Aceh is the existence of Regional Regulations, in this case, the Regency/Municipal Qanun in the field of taxes and levies whose regulations bring losses to investors and hinder investment. Moreover, some regulations regarding taxes and levies overlap, so this situation does not provide certainty for investors regarding the accumulation of capital they must spend for investment.<sup>11</sup> This situation shows that the regulation of investment in Aceh is not following the principle of legal certainty. The existence of the principle of legal certainty as a normative value that underlies each article in statutory regulation.<sup>12</sup> Legal certainty as a principle can be seen from the normative aspect of the existence of a norm as part of unity with the legal system. The existence of this principle can be interpreted as a condition that the law is particular because there are concrete arrangements in statutory regulation.<sup>13</sup>

## **II. Material And Methods**

This research is included in the type of normative juridical research. In this research, the approach used is the statutory approach, the conceptual approach, and the historical approach. The data in this study came from primary data and secondary data. Primary data is obtained from research locations related to the research object. The secondary data, namely data that has been processed and obtained from library research. Secondary data consists of primary legal materials, secondary legal materials, and tertiary legal materials. Data collection is needed to assist in the research process. For primary data, the collection is done through interviews with sources related to the research object. In this study, data analysis was carried out using qualitative methods. In addition, the legal materials that have been successfully collected will also be analyzed in a descriptive, comparative and evaluative manner. The descriptive analysis describes the legal situation in an orderly, systematic, logical, non-overlapping, and effective sentence to facilitate the data's discussion, understanding, and interpretation.<sup>14</sup>

## **III. Result**

### **1. Application of the Principle of Legal Certainty in Foreign Investment in Aceh**

The authority to administer investment is not only vested in the central government but also with the regional government. Aceh Province, as a region with special autonomy status, also has authority in that field, regulated explicitly in Law Number 11 of 2006 concerning the Government of Aceh. The implementation of investment in Aceh Province is carried out by the Provincial Government and Regency/Municipal Governments. They are given various tasks and authorities according to their positions based on the principle of special autonomy.<sup>15</sup> Investment practice in Aceh shows fluctuating conditions between investment targets and their realization between 2017 and 2022. This can be seen based on the following graphic data:

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<sup>10</sup>See Miswar Fuady, *Meluruskan Track Manageman Investasi Aceh*. Opini Serambi Indonesia, <https://aceh.tribunnews.com/2017/11/14/meluruskan-track-manajemen-investasi-aceh>, accessed on November 10, 2021.

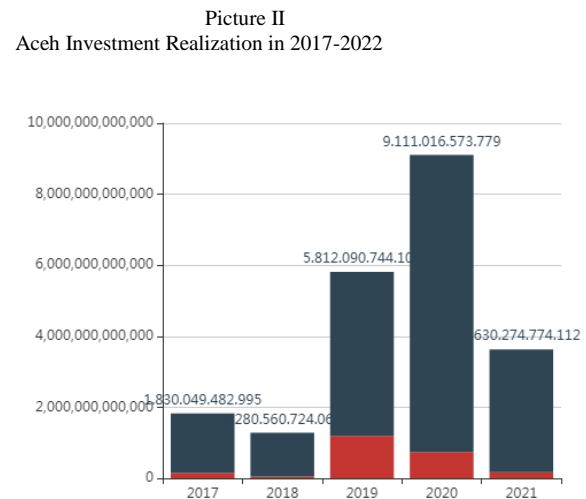
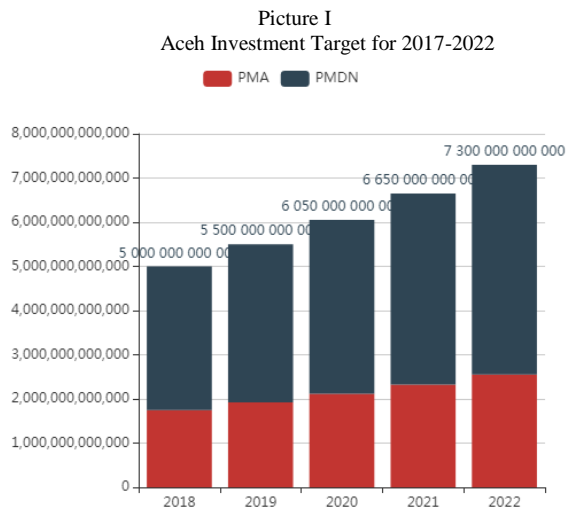
<sup>11</sup>In 2016 the Minister of Home Affairs canceled 65 (sixty-five) Qanuns in Aceh because they were deemed to have hampered investment. Most of the canceled Qanun is in the area of regional taxes and levies, [https://www.kemendagri.go.id/media/filemanager/2016/06/21/b/a/batal\\_perda\\_21\\_juni\\_2016.pdf](https://www.kemendagri.go.id/media/filemanager/2016/06/21/b/a/batal_perda_21_juni_2016.pdf), accessed on November 10, 2021.

<sup>12</sup>Article 6 Paragraph (1) of Act No. 12 of 2011 concerning the Establishment of Legislation.

<sup>13</sup> Mario Julyanodan Aditya Yuli Sulistyawan, *Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum*, *Jurnal Crepido* Volume 01, No. 01, July 2019, page. 14.

<sup>14</sup> I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*, Jakarta: Kencana, 2016, page. 135.

<sup>15</sup>Aceh's special autonomy in the local government legal literature is known as asymmetric decentralization. Debora Sanur L, *Implementasi Kebijakan Otonomi Khusus Aceh*, *Jurnal Politika* Vol. 11 No. 1, May 2020, page. 68.



Source: <https://datadpmpptsp.acehprov.go.id/>

The data shows that the realization of investment in Aceh shows a fluctuating number of targets set. However, for 2018 and 2019, the realization of investment value, both through domestic and foreign investment, is still far from the target value set.<sup>16</sup> As for 2020, the realization of the investment value exceeds the set target but is still dominated by domestic investment. Meanwhile, for 2021, investment realization in the second quarter (April-June) 2021 has reached Rp. 6,489 trillion or 97.58 percent of the target of Rp. 6,650 trillion, which is dominated by domestic investment.<sup>17</sup>

The principle of legal certainty in foreign investment is seen not only in the context of setting norms but also in the context of the implementation and operation of these norms. Legal uncertainty occurs when the implementation of foreign investment is not carried out in accordance with the will desired by the norm. There are several arrangements for foreign investment in Aceh which have an absolute position but are not implemented consistently, so the implementation of investment by foreign investors is hampered. Some of these provisions are related to the protection of investors' rights. This is as regulated in Article 4 of Aceh Qanun Number 5 of 2018, which states that:

- 1) The Aceh government provides security and comfort to all domestic investment (PMDN) and foreign investment (PMA) investors who carry out business activities in Aceh following statutory regulations.
  - 2) The Government of Aceh protects and guarantees the civil rights of investors who have invested in Aceh while protecting the community's civil rights by following the laws and regulations.
  - 3) The Government of Aceh protects all assets of investors who have invested in Aceh to avoid acts of usurpation, occupation, confiscation, and violence by third parties against the assets of investors and investors.
- According to these provisions, the Aceh government must guarantee a sense of security to all domestic and foreign investors. Furthermore, the Aceh government is also obliged to guarantee the protection of the civil rights of investors proportionally while still protecting the civil rights of local communities. In addition, the Aceh government must protect all investors' assets from all actions threatening the investor's control of these assets by other parties against the law. The Aceh government carries out this obligation by establishing various policies and directing the structure and power of the government according to its duties and functions to ensure that investors get proper legal protection.

In reality, the Aceh government's obligation to protect investors' assets has not been carried out following the provisions of the legislation. As a result, the investment activity carried out by PT Trans Continent failed because the Aceh government could not provide certainty about the sustainability of the investment and could not guarantee the protection of its assets, and had not provided various basic infrastructures to develop the Aceh industrial area in the Ladong area, Aceh Besar.<sup>18</sup> The Aceh government has also not been able to provide

<sup>16</sup>By regulation at that time, the Aceh government had made changes to regulations regarding investment with the establishment of Aceh Qanun Number 5 of 2018 concerning investment which was a renewal of Qanun Number 4 of 2013 concerning Amendments to Aceh Qanun Number 5 of 2009 concerning investment.

<sup>17</sup>See <https://www.bps.go.id/realisasi-investasi-penanaman-modal-dalam-negeri-menurut-provinsi-investasi>, accessed on November 5, 2021.

<sup>18</sup>PT Trans Continent has nine months of preparation and brought various equipment to prepare the Aceh Industrial Estate in Ladong. However, PT Pembangunan Aceh (PEMA), responsible for providing various

legal certainty regarding land leasing and governance between PT Pembangunan Aceh (PT PEMA) as the responsible Aceh government business entity and PT Trans Continent as an investor.<sup>19</sup>

Regarding the provision of fiscal facilities for investors, this has not been carried out optimally following Article 166 of the UUPA, which provides fiscal facilities such as imports of capital goods and investment facilities that the Aceh government has not adequately provided to investors. Furthermore, as for the criteria for investment activities that receive incentives, this has not met the specified requirements, especially regarding the absorption of local workers, transferring technology, preserving the environment, and partnership relationships with micro, small, medium enterprises, or cooperatives.

As for licensing that uses the Online Single Submission/OSS concept as regulated in Government Regulation 24 of 2018 concerning Electronically Integrated Business Licensing Services. It also has not been able to apply effectively, where vital features of licensing facilitation mechanisms such as information services and procedures for obtaining incentives are not regulated in regulations. In the industrial business, there are incentives in the form of fiscal facilities that business actors can obtain. NSPK (Norms, Standards, Procedures and Criteria) ideally regulates facilitation (information) and clauses regarding the procedures for obtaining these incentives. Information services should also be regulated in the NSPK, especially for small and medium-sized industries (IKM). These small-scale businesses can easily apply for permits and obtain business legalization. It is essential considering that many SMEs in the regions are in the informal realm (do not have business legality yet). The insufficient number of NSPKs in the industrial sector can potentially cause variations in the standardization of licensing services in the regions.

In terms of needs, there are still three NSPKs that the Ministry of Industry has not issued: integration (adaptation) of SIINAs Accounts with the OSS System, issuance of technical permits electronically, and regulation of construction locations within industrial estates. The absence of the NSPK has an impact on variations in local government policy responses that have an impact on licensing services. This condition will distort business services and variations between regions. As for other fields that affect investment activities, it also shows that the law is ineffective and consistent in following the will of the laws and regulations. In the field of the workforce, Article 176 paragraph (3) of the UUPA states that permits for foreign workers are granted at certain times and for certain positions based on recommendations from the Aceh government. In reality, this provision has not been implemented effectively where the entry of foreign workers to work on several national strategic projects without going through the recommendations of the Aceh government.<sup>20</sup>

Not implementing several norms related to foreign investment in Aceh in a consistent, effective, and consistent manner shows that the application of these norms has not shown legal certainty. The norms established by the state depart from the problem of reality, requiring a clear and consistent goal to be achieved. When the will desired by the norm is not achieved, then the norm contains weaknesses externally caused by factors outside the norm. This causes the existence of norms to have no validity, as norms apply in realizing legal certainty.

## **2. Application of the Ideal Legal Certainty Principle in the Regulation of Foreign Investment**

In the context of the application of the principle of legal certainty in the regulation of foreign investment in Aceh, this will be realized if it fulfills several conditions, including 1) There is legal synchronization both vertically and horizontally; 2) effective regulation of legal norms; 3) the provisions of norms that are not multi-interpreted; 4) the legal norms have validity when enacted; 5) can be implemented, and 6) does not conflict with higher regulations. First, if you look at the regulation of norms regarding foreign investment in Aceh, a harmonization and synchronization of regulations are needed not only concerning foreign investment. However, also in fields related to investment such as licensing taxes and levies, land, spatial planning, employment, and other fields. Other fields that affect investment activities. The harmonization is carried out through a legislative process.

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supporting facilities, has not yet performed its duties. Since the groundbreaking was carried out for nine months, there has been no legal certainty, no basic infrastructure facilities; clean water, inadequate electricity, roads in the area are not yet paved, drainage does not exist, see <https://aceh.tribunnews.com/hengkangnya-pt-trans-continent-dan-cet-langet-investasi-aceh-naik-370-persen?page=all>, accessed January 26, 2022.

<sup>19</sup>The CEO of PT Trans Continent, Ismail Rasyid, stated that another problem he experienced was the absence of basic infrastructure at KIA Ladong, such as the minimum standard for industrial areas. He considered that the location did not exist as promised by PT Pembangunan Aceh (PEMA). The infrastructure at KIA Ladong is the responsibility of PT PEMA. Meanwhile, as an investor, his party builds supporting facilities to create a Bonded Logistics Center (PLB), see <https://finance.detik.com/industri/d-5018367/investor-pusat-logistik-berikat-di-kawasan-industri-aceh-tarik-alat-kerja>, Diakses pada 26 januari 2022

<sup>20</sup> TKA di Meulaboh Tanpa Rekomendasi Pemerintah Aceh, <https://www.kba.80-lebih-tka-di-meulaboh-tanpa-rekomendasi-pemerintah-aceh/index.html>, Diakses pada 30 Januari 2022

Second, applying the principle of legal certainty in regulating foreign investment can also be carried out by regulating practical legal norms. What is meant by effective is that the legal norms are applicable and binding on parties in the implementation of foreign investment, be it investors, the government, the bureaucratic system, law enforcement structures, the business world, and the local community. Effective regulation of legal norms is primarily determined by forming laws and regulations which are carried out in a participatory manner, thus providing space for all parties to formulate norms that will later be applied to them.

Third, the provisions of norms that are not multi-interpreted—formulating legal norms that are not multi-interpreted shows that the process of forming laws and regulations must follow formal and material principles. The existence of multiple interpretations of legal norms will cause legal certainty not to be achieved because each party has its understanding and interpretation of these norms. It causes the law not to work as it should and has no validity in a system of norms. A norm regarding foreign investment that is not multi-interpreted is quite essential, particularly concerning the regulation on the provision of tax and fiscal relief incentives for investors based on specific criteria stipulated in the legislation. Norm provisions that are not multi-interpreted will also determine the effective implementation of the authority to administer investment, especially concerning the relationship of authority between the central and regional governments in determining taxes and levies for investors.

Fourth, legal norms have validity when enforced. According to Hans Kelsen, the validity of norms is the existence of specific norms. A norm is valid if it can describe the existence of the norm and has binding power to the subject being regulated.<sup>21</sup>In the context of foreign investment norms, these norms have validity when the existence of these norms is binding on all parties related to investment, be it investors, government, or local communities. Various parties involved in investment activities have various rights and obligations that affect one another. For example, the government and local governments must protect investors' assets and fiscal incentives as a business convenience. Investors also have obligations that must be carried out, including economic activities. The businesses they run can absorb labor, build infrastructure, transfer technology, build partnerships with small and medium enterprises, and protect and protect the environment. Norms regarding foreign investment have validity when the rights and obligations are carried out by the parties involved in the investment activities.

Fifth, it can be implemented. The regulation of norms regarding foreign investment must be implemented with the intention that something normalized is concrete and can be implemented following the external and internal conditions and aspects that determine the applicable norm. In the formation of legislation, one of the principles is that it can be implemented. This is related to the legitimacy of the regulation juridically, sociologically, and philosophically. In the context of regulation on foreign investment, a norm regulated to facilitate investment activities must be implemented following the conditions and circumstances and related to incentives for investors that will be given if they meet various criteria and certain types of business. The requirements for investors to get these incentives must be realistic and can be fulfilled so that this does not make it difficult for investors to fulfill them. Likewise, the obligation to transfer technology and empower local workers must be seen realistically, following the potential of local workers and human resources to transfer the technology.

Sixth, it does not conflict with higher regulations. One of the problems in forming laws and regulations is a norm conflict caused by sectoral egos between the regulatory authorities (norm creating authority). This is inseparable from the influence of the government system of a country where government functions are carried out by many organs, attached to which the authority to form regulations is based on the authority obtained by attribution or delegation. Therefore, regulations on foreign investment in Aceh must not conflict with higher regulations and make substantive adjustments if the national provisions are changed.

#### **IV. Conclusion**

Applying the principle of legal certainty in implementing laws and regulations concerning foreign investment in Aceh has also not followed the legislation's will. As the organizer of investment, the Government of Aceh has not been able to carry out its obligations to protect investors' assets. As a result, it does not provide certainty about the sustainability of investment activities. In addition, investors have not fulfilled their obligations, especially in empowering local workers, transferring technology, and cooperating with small and medium enterprises. The ideal application of the principle of legal certainty in the regulation of foreign investment in Aceh if it meets several criteria, namely: a) There is a synchronization of arrangements both vertically and horizontally; b) setting norms regarding effective and non-multi-interpreted investment; c) the regulation of norms regarding foreign investment has validity concerning its validity; d) the norms can be

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<sup>21</sup>JimlyAsshiddiqie dan Ali Safa'at, *Teori Hans Kelsententang Hukum*, Jakarta: Setjen-Kepaniteraan MK RI, 2006, hlm. 35

implemented following the needs and objectives of the investment, and e) its regulation in Aceh Qanun and Regency/City Qanun does not conflict with higher regulations.

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