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HONORABLE JUDGE, PRESIDENT OF THE CONSTITUTIONAL COUNCIL

MAPUTO

Your excellency,

BUDGET MONITORING FORUM (*Fórum de Monitoria do Orçamento*, **FMO**), a not-profit platform of civil society organisations (CSO), interested in the area of management of public finances, with a primary goal of strengthening civil society organisations capacity in monitoring and influencing fiscal and financial policies, currently coordinated by **the association N'WETI COMUNICAÇÃO PARA A SAÚDE** [N'weti Communication for Health], based in Bairro of Sommerschild, Rua Elias Kumato, No. 288, in Maputo, represented by Mrs. **Denise Marília Augusto Dias Namburete**, a married woman of Mozambican nationality and resident in Maputo, and other two thousand citizens, respectfully, through their attorney **Dr. Stela Santos** [under the terms of Article 47 of the Organic Law of the Constitutional Council, Law no. 6/2006 of the 2nd of August (**LOCC**)], with an office at Eduardo Mondlane Avenue, no 149, 2nd floor, rooms 168 and 169, in the Bairro of Ponta-Gêa, city of Beira, in accordance with **Article 245 (2) (g) of the Constitution of the Republic in conjunction with Article 60 (2) of the LOCC, and Article 41 (b) of the mentioned LOCC**, come to propose and to act following what is presented below

SUCCESSIVE REVIEW ACTION OF THE CONSTITUTIONALITY OR LEGALITY OF ARTICLE 1 OF THE RESOLUTION OF THE ASSEMBLY OF THE REPUBLIC NO. 11/2016, OF THE 22ND OF AUGUST, 2016, THAT APPROVES THE GENERAL STATE ACCOUNT FOR THE FINANCIAL YEAR 2014

On the basis of the following factual and legal grounds,

I. OF FACTS:

1st

In 2013, EMATUM - Empresa Moçambicana de Atum [Mozambican Tuna Company], SA contracted a 850 million US dollars loan for the import of fishing vessels and equipment and for coastal protection through the issuance of private bonds "euro bonds" together with Credit Suisse Group.

2nd

The contraction of this loan was not included in the Proposal of General State Budget (**OGE**) Law

for 2013.

3rd

Therefore, it was not authorized by Law No. 1/2013, of the 7th of January, which approved the State Budget for the year 2013.

4th

This loan was guaranteed by the State, and in 2015 this same debt have been restructured, due to the inability to pay the agreed installments (see Administrative Court (TA): *Relatório sobre a Conta Geral do Estado de 2015* [Report on the General State Account for 2015] (CGE 2015), p. X-2; the Assembly of the Republic (AR): *Conta Geral do Estado de 2014* [General Account of the State for 2014], (CGE, 2014), Vol. 1, 2015, pp. 51-52; and, AR: *Relatório da Comissão Parlamentar de Inquérito da Assembleia da República, para Averiguar a Situação da Dívida Pública* [Report of the Parliamentary Commission of Inquiry of the Assembly of the Republic, into the situation of the Public Debt], November 2016 (CPI), pp. 28, 33).

5th

The limit value for the granting of guarantees and warranties to be awarded by the State in 2013 was established by article no. 11 of the Law no. 1/2013, of the 7th of January, which approved the State Budget for 2013, and was set at 183,500 thousand Meticaís, corresponding to the value of 5 million US dollars.

6th

The value of the debt is 850 million US dollars. Exceeding the amount of the authorized guarantee (AR: CPI, p. 33).

7th

On the other hand, the General State Account (CGE) of 2013 does not contain any information on the guarantees and warranties granted by the State (TA: *Relatório sobre a Conta Geral do Estado de 2013*, page X-16).

8th

It appears later for the purpose of validation, in the Resolution of the Assembly of the Republic that has approved the General State Account for the financial year of 2014 (cfr. AR: CGE, 2014, p.52).

9th

The Assembly of the Republic, through its Resolution 11/2016, that has approved the General State Account for the financial year of 2014, published in the Bulletin of the Republic no. 100, I Series, dated 22/08/2016, approves, in its article No. 1, the abovementioned State General Account for the financial year 2014, seeking in this way to validate deeds that are recognized as null.

II. OF THE LAW:

- A. The contraction of the non-concessional loan in the amount of 850 million US dollars through the issuance of private bonds "*euro bonds*" together with Credit Suisse Group

10th

EMATUM, SA was established by a public deed of the 2nd of August, 2013, in the form of a private limited company. The analysis of its shareholder structure shows that it is **a limited company exclusively owned by the Mozambican State** (cfr. BR No. 71, III series, dated 5th September 2013, and BR No. 111, III series, 16th Of September 2013, and AR: CPI, pp. 24-25 and 28).

11th

Although formed as a private limited company and subject to the provisions of the Commercial Code in the course of its commercial activity, EMATUM, SA, **does not acquire for that reason the status of a "commercial entrepreneur"** (cfr. article 15/1 of the Decree-Law 2/2005, of the 27th of December, that approves the Commercial Code (CCOM)).

12th

Being a company created by the State, although it has been incorporated as a commercial company, it **falls within the exercise of the Public Administration in its private form** (cfr. AR: CPI, p. 67), **integrating the Public Administration in its objective purpose.**

13th

It means that "insofar as it is permissible for a private legal actor to perform administrative tasks, **there are "legal-private forms", but not with the freedom and possibilities of private autonomy**", since the rules of general private law, are always "complemented, replaced or modified by the norms of Public Law" (see Maria João Estorninho: *A Fuga para o Direito Privado – Contributo para o estudo da actividade de Direito privado da Administração Pública* [The Escape to Private Law - Contribution to the study of the activities of private law of the Public Administration], Almedina, Coimbra, 1999, p. 129), and it is not for the Administration, whatever the mode of action chosen, to act, always, according to "the purpose or set of purposes for which it was constituted" (Michele Cantucci: *L'Attivita di Diritto Privato della Pubblica Amministrazione* [Private Law activities of the Public Administration], Cedam, Padova, 1941, p. 16, *apud* Maria João Estorninho: *A Fuga para o Direito Privado*, p. 130).

14th

Therefore, EMATUM, SA does not enjoy full private business autonomy, being a subject to a set of legal-public bindings (see Maria João Estorninho: *A Fuga para o Direito Privado*, pp. 122-127, and bibliography cited within), with particular emphasis on: (1) **the principle of pursuing the public interest** (Article 249/1 (1) of the CRM); (2) **the principle of legality, *rectius*, of the jurisdiction** (Article 249/2 (2), of the CRM); and (3) **the principle of efficiency** (article 250/1 of the CRM).

15th

The creation and management of these types of companies is, from the outset, linked to the pursuit of the public interest (cfr. AR: CPI, p.17).

16th

The public interest is defined by the Government, as the superior body of the Public Administration, and has a variable meaning and content, adjusted to the times and the options that the law establishes as suitable for the promotion of the common good.

17th

From the analysis of the borrowing conditions by the Parliamentary Commission of Inquiry, it was concluded that they took into account “the existence of threats to sovereignty, territorial integrity, in particular characterized by illegal activities of maritime piracy, illegal immigration, drug trafficking, illegal fishing, the presence of private maritime security forces to protect private targets in national territorial waters, with insufficient financial and human resources for the effective protection of sovereignty” (AR: CPI, pp. 4 and 16-17).

18th

The loan for this company was contracted by the so-called Project for Monitoring and Protection of the Exclusive Economic Zone, whose purpose was to respond to abovementioned threats to the sovereignty and protection of the national heritage (AR: CPI, p. 16).

19th

In the case at hand, **the primary public interest to be pursued, as it was concluded by the CPI, would have been 'protection of sovereignty and national heritage'.**

20th

Now, EMATUM, SA has as its main objectives **the fishing activity of tuna and other fishery resources, including the catch, reception, processing, storage, handling, transit, marketing, import and export of such products**, being able to exercise other activities provided that these are authorized or that the members have decided so; and that these activities **are related to the main activity** (cfr. BR No. 71, Series III, of 5th of September, 2013, and BR No. 111, Series III, of 16th of September, 2013, and AR: CPI, pp. 24-25 and 28).

21st

As has been stated by the Administrative Court, the loan contracted by EMATUM, SA, was used for the import of vessels and fishing equipment and for coastal protection. In this sense, of the total value of 850 million US dollars, 500 million were used for maritime safety and were allocated to the Ministry of National Defense, and 350 million US dollars for the acquisition of tuna fishing vessels, spare parts, licenses and other commercial assets. This last portion of the credit to EMATUM, SA, of 350 million US dollars, had the State as its guarantor. (TA: CGE, 2015, p. X-22).

22nd

However, at the outset, coastal protection does not belong to the corporate purpose of EMATUM, SA.

23rd

On the contrary, this task falls within the competence reserved to the Armed Forces of Defense of Mozambique (cfr. article 8 of Law no. 17/97, of the 1st of October, Defense and Security Policy Law, and what has been written in this regard in the RA: CPI, pp. 44-47).

24th

On the other hand, currently the Administration is bound not only by the law, but also by the Constitution (cfr. article 249/2 (1), of the CRM), and by a set of fundamental legal principles, such as the principles of equality, impartiality, ethics and justice (cfr. article 249/2 (2), of the CRM) (for an identical wording in the Portuguese Constitution, see J.J. Gomes Canotilho and Vital Moreira,

Constituição da República Portuguesa Anotada [the Annotated Constitution of the Portuguese Republic], Vol. II, Articles 108 to 296, 4th edition, Coimbra Editora, Coimbra, 2010, annotation to the article 266, pp. 791), which bind the Administration, even if it acts using its discretionary powers, or under modes of action under the Private law.

25th

From the above stated, it is justified that today it makes more sense to speak of "the principle of juridicity" (for an approximation to the concept of juridicity see António Castanheira Neves: *Curso de Introdução ao Estudo do Direito* [Course of Introduction to the Study of Law], Policopiado, Coimbra, 1972, p. 496.) or, if one prefers, what French doctrine, in the wake of Hauriou, usually designates as the "legal block" (see Maurice Hauriou: *Précis de Droit Administratif et de Droit Public* [Specifics of the Administrative and Public Law], 8e édition, Recueil Sirey, Paris, 1914, P. 55), and not only of principle of the legality of the Administration.

26th

This type of entity, which EMATUM, SA, is an example of, "do not stop being public through exercise of initiatives of economic nature, even if they use forms or instruments of the Private Law, and therefore **can not enjoy, by definition, the ‘liberties’, before obeying the principle of legality**" (Paulo Otero: *Vinculação e Liberdade de Conformação Jurídica do Sector Empresarial do Estado* [Bonding and Freedom of Legal Formation of the State Business Sector], Coimbra Editora, Coimbra, 1998, p. 123).

27th

It has been established, that **the contraction of this loan was not included in the Proposal of the General State Budget Law of 2013.**

28th

Nevertheless, submission of the proposal for a State Budget Law to the Assembly of the Republic is an initiative reserved for the Government (articles 204/1 (e) and 206/1 (a) of the CRM), and it should contain all the fundamental information on income forecasts, expenditure limits, financing of deficit and all the elements that substantiate budgetary policy (Article 130/3 of the CRM), for the purposes of its approval, in accordance with Articles 130/1, 2 and 3 and pursuant to the article 179 (2) (m) of the CRM.

29th

Among other elements, stated in article 24 of the Financial Administration System, approved by Law no. 9/2002, of the 12th of February (LSISTAFE), the proposal of the State Budget Law ought to contain "**the budget proposal for all bodies with administrative and financial autonomy, municipalities and State enterprises**" (article 24/4 (f) of the LSISTAFE).

30th

Therefore, it was not authorized by Law no. 1/2013, of the 7th of January, which approved the State Budget for the year 2013 (cfr. AR: CGE, 2014, Vol. I, 2015, p. 52).

31st

On the other hand, the loan was contracted in normal market terms, being therefore "non-concessional", while the aforementioned Law No. 1/2013 establishes in Article 9 (2) that **loans to be contracted by the State should guarantee a degree of concessionality equal to or greater**

than 35%.

32nd

Lastly, **the abovementioned loan is not even mentioned in the General State Account of 2013,** nor could it be, because it was unknown to the AR until 2014.

33rd

The act of approval of the General State Account, which does not contain public debt information, that it must contain, in accordance with Article 47 (b), (c) and (e) of the Law 9/2002 (LSISTAFE), directly violates the Constitution, since **the Assembly of the Republic, in the exercise of its function stated in article 131 of the CRM, would have had approved an incomplete General State Account, because it did not contain all the essential elements for its estimation and approval.**

34th

Since the contraction of this loan was not foreseen in the Proposal of the State General Account Law for 2013, **this loan was contracted, without the proper authorization of the Assembly of the Republic, stated in article 179 (2) (p) of the CRM,** under the terms of which it is the responsibility of this body to "authorize the Government, defining the general conditions, to contract or grant loans, [...], for a period exceeding one financial year".

35th

This issue is all the more relevant because part of this amount, "500 million US dollars for maritime security, has been allocated to the Ministry of National Defense" (cfr. AR: CGE, 2014, Vol. I, 2015, p. 52; TA: Report on the General State Account for 2014, pp. X-21, and CGE, 2015, p. X-22).

B. The issue of the Government guarantee to the non-concessional loan in the amount of 850 million US dollars, through the issuance of private bonds "euro bonds", with Credit Suisse Group, contracted by EMATUM, SA

36th

According to the Report and Opinion of the Administrative Court on the General State Account for 2013, "the Government, without proper authorization, issued guarantees and warranties totaling 28,346,620 thousand Meticaïs" (see TA: CGE, 2015, Pp. X-2, 16 and 22; AR: CGE, 2014, Vol. I, 2015, pp. 51-52, and AR: CPI, pp. 28, 33).

37th

The limit value for the granting of guarantees and warranties to be granted by the State in 2013 was established by article 11 of the Law no. 1/2013, of the 7th of January, which approved the 2013 State Budget, and was set at 183,500 Thousand Meticaïs, corresponding to the value of 5 million US dollars.

38th

The value of the debt is 850 million US dollars. Exceeding the amount of the authorized guarantee (AR: CPI, page 33).

39th

On the other hand, the CGE of 2013 does not contain any information on the guarantees and warranties granted by the State (TA: CGE, 2013, pp. X-16).

40th

It appears later for the purpose of validation, in the Resolution of the Assembly of the Republic approving the General State Account for the financial year of 2014 (cfr. AR: CGE, 2014, Vol. I, 2015, p.52).

C. Legal Consequences

a) Of the flaws invoked

41st

It means that, in the light of Mozambican law, both the loan contracted by EMATUM, SA and the guarantee granted by the Government, combine a series of flaws, all of which qualify and contribute to the nullity regime.

- 1. Regarding the loan contracted by EMATUM, SA in 2013, in the amount of 850 million US dollars, through the issuance of private bonds "euro bonds", to Credit Suisse Group:**

42nd

Because it was contracted without the authorization of the Assembly of the Republic, under the terms and effects of article 179/2 (p) of the CRM, and therefore is not included in the Law No. 1/2013, of the 7th of January, that has approved the State Budget for year 2013 (see AR: CGE, 2014, Vol. I, 2015, p. 52), therefore the loan agreement contracted in 2013 by EMATUM, SA in the amount of 850 million US dollars, **is null and void due to usurpation of power, pursuant to article 129 (2) (a) of Law no. 14/2011, of the 10th of August, the Law of Administrative Procedure (LPA).**

43rd

In view of the fact that the primary public interest in pursuing the contraction of this loan, guaranteed by the Government, would be to safeguard sovereignty and national heritage, partly because it was contracted for the acquisition of tuna fishing vessels, spare parts, licenses and other commercial assets held by EMATUM, the loan agreement contracted in 2013 by EMATUM, SA, in the amount of 850 million US dollars, **is null and void due to misuse of powers pursuant to article 129 (2) (b) of the LPA.**

44th

Also taking into account the same public interest, the protection of sovereignty and national heritage, in comparison with the corporate purpose of the company that contracted it, the loan agreement entered into in 2013 by EMATUM, SA, in the amount of 850 million US dollars, **is null and void for violating the law, in the strict sense, due to the legal impossibility of the object, pursuant to article 129 (2) (d) of the LPA.**

45th

Taking into account that the loan was contracted in normal market terms, thus being "non-concessional", thus violating the provisions of article 9 (2) of the Law no. 1/2013, the loan agreement (Loan) contracted in 2013 by EMATUM, SA, in the amount of 850 million US dollars, **is null and void, in this case due to violation of the law, in the strict sense**, pursuant to article 9 (2) of the Law No. 1/2013.

46th

The Proposal of State Budget Law did not contain "all fundamental information on income forecasts, expenditure limits, financing of deficit and all the elements that substantiate budgetary policy (article 130/3 of the CRM and article 24/4 (f) of the LSISTAFE) for the purpose of its approval. Therefore, it was not authorized by the Assembly of the Republic, pursuant to article 179 (2) (m) and (f) of the CRM. **Therefore, it was not included in Law no. 1/2013, of the 7th of January, which approved the State Budget for the year 2013.** Therefore, **it is null and void, for violation of the law in a broad sense (the Constitution).**

47th

Finally, the abovementioned loan is not even mentioned in the General State Account of 2013, nor could it be, because it was unknown to the AR until 2014. The act of approval of the General State Account, which does not contain the information on public debt that it should contain, in accordance with Article 47 (b), (c) and (e) of the Law 9/2002 (LSISTAFE), directly violates the Constitution, inasmuch as AR, in the exercise of its function set forth in art. 131 of the CRM, have approved an incomplete General State Account, because it did not contain all the essential elements for its estimation and approval. Therefore **it is being null and void, for violation of the law in the broad sense (the Constitution).**

2. Regarding the guarantee issued by the Government, to the company EMATUM, SA, for the contracting of the abovementioned loan.

48th

Taking into account that the loan contracted amounts to 850 million US dollars, and the limit value for the granting of warranties and guarantees to be granted by the State in 2013, established by article 11 of the Law No. 1/2013, which approved the State Budget for 2013, was set at 183,500 thousand Meticaís, corresponding to the value of 5 million US dollars, it is established that the guarantee provided exceeds the amount of guarantees authorized for that year, which results in its **invalidity, due to violation of law, in the strict sense**, of Article 11 of the Law no. 1/2013 and of article 15 (4) of the LSISTAFE.

49th

Taking into account that budget allocations constitute the maximum limit to be used in the execution of public expenditures, in the corresponding case, as stated in article 15 (4) of the LSISTAFE, the Government may only authorize loans and guarantees until the amount provided for in the law of the budget **and within the purposes and conditions referred to therein**. The guarantee is also **null and void now for violation of the law, in the broad sense**, pursuant to article 179 (2) (p) of the CRM, according to which it is the Assembly of the Republic that authorizes the Government, defining the general conditions, to carry out credit operations, in particular, to grant guarantees, and establishes its maximum limits.

50th

Because, due to all of this, and as a consequence, **the granting of the abovementioned guarantee not being included in the General State Account for 2013 directly violates the Constitution, since the AR, in the exercise of its function set forth in article 131 of the CRM, have approved an incomplete State General Account, because it did not contain all the essential elements for its estimation and approval.**

3. Regarding the Resolution of the Assembly of the Republic approving the General State Account for the financial year 2014. Resolution no. 11/2016, of 22/08/2016.

51st

The consequences of the defects, which have just been listed above, in this particular case, can not stay in force due to the effects of the rule of declaration with a general mandatory force on unconstitutionality or on illegality: the nullity of acts and the insusceptibility of producing any financial effect, pursuant to article 66 (1) of the LOCC.

52nd

Any validation or sanction *a posteriori* is not admissible.

53rd

This is because (1) the nullity operates ipso jure, the judicial decisions recognizing the nullity are of a mere declarative value; (2) invalidity may be invoked at any time (the final part of article 245/1 of the CRM) and may be challenged by any of the subjects provided for in article 245/2 of the CRM, even if they are not directly interested in the elimination of the act; (3) nullity is not subject to sanction or validation (see J.J. Gomes Canotilho: *Direito Constitucional e Teoria da Constituição* [Constitutional Law and Theory of the Constitution], 5th ed., Almedina, Coimbra, 2002, pp. 939, 941-942, 945, 1006; Miranda: *Manual de Direito Constitucional* [Manual of Constitutional Law], Volume II, 5th ed., Coimbra Editora, Coimbra, 2003, pp. 367 ff.).

54th

Since the acts analyzed above are **clearly null and void**, the Parliament can not seek to 'neutralize' any administrative or judicial declaration of unconstitutionality or illegality, by means of retroactive validation, by simple act of normative (or legislative) content, together with acts exercised in violation of the constitutional or legal provisions referred to above (cfr. J.J. Gomes Canotilho: *Direito Constitucional e Teoria da Constituição*, pp. 1070-1071), as it was intending to do with the adoption of Resolution of the Assembly of the Republic approving the General State Account for the financial year of 2014, which in itself affected by nullity, for violation of the law in a broad sense.

55th

The legislator can not "constitutionalize" by law, much less a simple act of normative content, such as the Resolution, that which is unconstitutional or illegal, and as was stated by the Constitutional Council. Hence the existence of a general negative limit of the legislator: prohibition of the reproduction, through law, of the norm declared unconstitutional (cf. article 248/1 of the CRM).

III. OF THE REQUEST

That Article 1 of Resolution No. 11/2016 (BR No. 100, Series I, of 22/08/2016), that approves General State Account of the financial year of 2014, be declared unconstitutional or illegal, with

general binding force, for violation of the law in a broad sense, pursuant to paragraph 1 of article 245 of the CRM, and paragraph 1 of article 66 of LOCC.

Respectfully awaiting your approval,

Maputo, [date]

Attorney

Professional registration No 1011 OAM [the Order of Lawyers of Mozambique]

[Table]

Name

Signature conforming to the Identity Card

No. of Identity Card