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**Report of the Bills Committee on
Conservation of Antarctic Marine Living Resources Bill**

Purpose

This paper reports on the deliberations of the Bills Committee on Conservation of Antarctic Marine Living Resources Bill ("the Bills Committee").

Background

2. The Convention on the Conservation of Antarctic Marine Living Resources ("CCAMLR") is an international convention entered into force in 1982 with the objective of conserving Antarctic marine living resources. The Commission for the Conservation of Antarctic Marine Living Resources ("the Commission"), established under Article VII of CCAMLR, regulates activities associated with the rational utilization and management of the marine living resources in the Convention Area¹ and adopts a set of Conservation Measures ("CMs")² to support the conservation of Antarctic marine living resources and the management of fisheries in the Southern Ocean.

3. Currently, there are a total of 36 Contracting Parties ("CPs"), comprising 25 members and 11 acceding states, committed to be bound by CCAMLR and its CMs. The People's Republic of China acceded to CCAMLR in 2006. According to Article 153 of the Basic Law, the application to the Hong Kong Special Administrative Region ("HKSAR") of international agreements to which the

¹ Convention Area is defined in clause 2 of the Conservation of Antarctic Marine Living Resources Bill as the area south of 60° south latitude and the area between that latitude and a line joining several stated points along parallels of latitude and meridians of longitude.

² CMs may set out the requirements on compliance with the conservation of various species under CCAMLR, gear regulations, data reporting, research and experiment, environmental protection, etc. They will be updated and expanded from time to time. As at end-March 2018, there were a total of 69 CMs.

People's Republic of China is a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of HKSAR, and after seeking the views of the HKSAR Government.

4. One of the major organisms being regulated under CCAMLR is toothfish³. The fact that toothfish is highly sought after and traded internationally as a table fish in some countries makes toothfish resources experiencing significant levels of exploitation and illegal, unreported and unregulated fishing ("IUU fishing"). According to the Legislative Council ("LegCo") Brief (File Ref: FH CR 1/2576/18) issued by the Food and Health Bureau and the Agriculture, Fisheries and Conservation Department ("AFCD") in June 2018, some CPs to CCAMLR have expressed concerns about the lack of regulation over the trading of toothfish in Hong Kong and requested HKSAR to consider implementing the Catch Documentation Scheme for toothfish⁴ under CCAMLR. The Central People's Government, after consulting the HKSAR Government, has agreed in principle to extend the application of CCAMLR to HKSAR.

5. According to the Administration, after the extension of CCAMLR to HKSAR, both CCAMLR and its CMs will be binding on HKSAR. However, as Hong Kong has no fishing vessel operating in the Convention Area and will unlikely have any in the future, the HKSAR Government will implement CCAMLR and only those six CMs relevant to Hong Kong (see **Appendix I**).

The Bill

6. The Conservation of Antarctic Marine Living Resources Bill ("the Bill") was introduced into LegCo on 4 July 2018. The Bill seeks to provide for the implementation of CCAMLR (including CMs adopted under CCAMLR); and to provide for related matters. The Secretary for Food and Health ("SFH") would be empowered to make regulations⁵ to provide for the implementation details.

³ *Dissostichus* spp., including Antarctic toothfish (*Dissostichus mawsoni*) and Patagonian toothfish (*Dissostichus eleginoides*), are sold under different common names such as Chilean seabass or white cod.

⁴ With a view to protecting toothfish from severe exploitation by IUU fishing internationally, the Commission adopted CM10-05 "Catch Documentation Scheme for *Dissostichus* spp." in May 2000.

⁵ According to the Administration, two Regulations (respectively concerning the Toothfish Catch Documentation Scheme and port inspections for fishing vessels) will contain the necessary legislative provisions for implementing the six CMs as set out in Appendix I that are related to regulating the trading of toothfish and deterring IUU fishing activities in the Convention Area.

The Bills Committee

7. At the House Committee meeting on 6 July 2018, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix II**.

8. Under the chairmanship of Mr Steven HO, the Bills Committee has held three meetings with the Administration. The Bills Committee has, from mid-July to early-September 2018 invited written submissions on the Bill. One submission was received from the Jane Goodall Institute Hong Kong.

Deliberations of the Bills Committee

Magnitude of impact

9. Members generally support the implementation of CCAMLR. As LegCo Member representing the Wholesale and Retail Functional Constituency, Mr SHIU Ka-fai has advised that the trade generally considers that the introduction in Hong Kong of regulatory control over the trading of toothfish will not cause significant burden on their operation. In response to Mr Steven HO's and Mr HUI Chi-fung's enquiries about the annual trade volume (including import, export and re-export) of toothfish in Hong Kong, the Administration has advised that according to statistics compiled by the Commission, toothfish imported into Hong Kong in recent years represents about 10% of the total volume exported by CPs. Other major importing economies of toothfish include the United States and Japan.

Status of the Commission

10. Clause 3 of the Bill seeks to provide that the Commission has legal personality in Hong Kong; and enjoys in Hong Kong the necessary legal capacity to perform its function and achieve the purposes of CCAMLR. Mr Steven HO and Mr HUI Chi-fung have sought clarification on what exact function(s) the Commission will perform for the purposes of the Conservation of Antarctic Marine Living Resources Ordinance ("the Ordinance") if the Bill is passed; and the reasons for as well as the necessity of giving the Commission a legal personality in Hong Kong.

11. According to the Administration, there is an obligation on a CP to give the Commission a legal personality in its territory pursuant to Article VIII of CCAMLR. The Secretariat of the Commission is based in Australia without a presence in HKSAR. While the Administration does not anticipate that the Commission will actively perform its function in HKSAR, it is an obligation

applicable to HKSAR once CCAMLR is extended to HKSAR. The term "necessary legal capacity" in clause 3(b) of the Bill refers to giving the Commission the legal personality of a body corporate and all the powers of a natural person of full age and capacity such that the Commission can enjoy the powers to enter into contracts, to acquire and dispose of movable and immovable properties, and to institute and defend legal proceedings in Hong Kong.

Regulations to be made for implementing CCAMLR and CMs

Application of the regulations to be made

12. Clauses 4 to 7 of the Bill seek to set out the regulation-making powers of SFH for implementing in Hong Kong CCAMLR and the relevant CMs, and for prescribing related fees. Members note that under clause 4(2), the regulations to be made under clause 4 may be expressed to apply to (a) Hong Kong vessels (wherever they may be), and other vessels while they are within Hong Kong waters; and (b) Hong Kong persons (wherever they may be) and Hong Kong companies (wherever they may be acting), as well as other persons (including companies and bodies corporate that are not Hong Kong companies) acting in Hong Kong. While accepting the rationale behind the making of regulations with extra-territorial effect, Mr Kenneth LEUNG has requested the Administration to provide, at the time when the regulations are tabled in LegCo, the subcommittee studying the relevant regulations, if formed, with the framework concerning extra-territorial operations under clause 4(2) and explain in detail how the regulations will apply to "Hong Kong persons", "Hong Kong companies" and "other persons acting in Hong Kong".

Adoption of the direct reference approach

13. The Legal Adviser to the Bills Committee has pointed out that under clause 4(3), SFH may, in the regulations to be made under clause 4, adopt the "direct reference approach" ("DRA"), i.e. an approach of making direct reference to the provisions in CCAMLR or in a CM that apply to Hong Kong in making regulations under the Bill in future. An enquiry has been raised about the reasons for adopting DRA. The Administration has explained that CMs are reviewed and developed at each annual meeting of the Commission. Adopting DRA will ensure that the local legislation could keep pace with any changes made to CMs by the Commission. CMs are readily available on the Commission's official website, providing a direct and convenient means for those parties required to comply with the requirements to access to the updated CMs. It is worth noting that the majority of CMs are very specific and technical in nature (e.g. CM10-04 "Automated satellite-linked Vessel Monitoring Systems"). Adopting DRA helps ensure that the local legislation will reflect fully CCAMLR's technical requirements.

Law enforcement

Manpower and resources for enforcement

14. Members have expressed concerns about various issues relating to law enforcement, including the manpower and resources required for implementing CM10-05 "Catch Documentation Scheme for *Dissostichus* spp.", the coordination among government departments in port inspection and control (covering declaration and notification requirements, vessel inspection and denying port access of vessels). There is a view that the Administration should ensure that, in the event that a vessel seeking to enter Hong Kong is suspected of having had engaged in IUU fishing activities, public officers concerned will have the necessary capability to undertake frontline enforcement work, in particular, handling the testing of toothfish samples.

15. According to the Administration, AFCDC will be responsible for implementing the new licensing system for the toothfish trade and operating the electronic Catch Documentation Scheme under CM10-05 "Catch Documentation Scheme for *Dissostichus* spp." The Customs and Excise Department ("C&ED") will provide assistance to AFCDC in detecting illegal shipments of toothfish, whereas the Government Laboratory ("GL") will conduct testing of toothfish samples. Regarding port inspections of fishing vessels, AFCDC will take the leading role with the support from the Marine Department ("MD") in matters spanning over inspection of the subject vessels, denying port access and prohibiting landing or transshipping of catch of fishing vessels which have engaged in IUU fishing activities in the Convention Area contravening CMs in force. In carrying out enforcement duties under the Ordinance, if enacted, assistance from the Police will be sought where necessary.

16. The Administration has also advised that about 300 samples will be tested annually in the first five years of implementation. Additional manpower will be required to cope with the increased workload arising from the implementation of the Ordinance, if enacted. A team comprising several professional and technical staff under AFCDC would be required. Another team of professional and technical staff of a similar scale under GL would also be needed to conduct testing of toothfish samples. Suitable training on inspection of fishing vessels and identification of toothfish will be provided to AFCDC's frontline staff to equip them with the necessary skill and knowledge, in order to carry out the enforcement duties. Mr Steven HO and Dr Elizabeth QUAT note with concern that among those licensed/authorized vessels⁶ eligible to operate in the Convention Area, only 10 had entered Hong Kong waters during the period from 2013-2014 to 2017-2018 for the purposes of bunkering and replenishment. In

⁶ The vessels include fishing vessels, receiving vessels and transporting vessels.

their view, the Administration should critically assess the need for creating two teams of professional and technical staff under AFCD and GL to carry out the additional workload/enforcement duties.

Appointment of authorized officers

17. Having regard to the advice of the Legal Adviser to the Bills Committee, members have suggested the Administration to clearly provide for in the Bill the minimum rank(s) of the public officers to be appointed as authorized officers under clause 9(1) and to be delegated with the functions of the Director of Agriculture, Fisheries and Conservation ("DAFC") under clause 10(1), drawing reference to other ordinances (e.g. section 29 of the Genetically Modified Organisms (Control of Release) Ordinance (Cap. 607)) and the related legislative history.

18. In response, the Administration has explained that other than officers of AFCD, officers from other departments, e.g. MD and C&ED, may be authorized to carry out relevant duties under the Ordinance, if enacted, such as inspecting documents in relation to Antarctic marine organisms. Hence, unlike section 29 of Cap. 607 whose scope is confined to authorizing officers of AFCD, the Bill as drafted will allow flexibility for DAFC to appoint officers at different ranks in different grades of different departments as authorized officers in accordance with operational needs. The Administration has stressed that while it is not practical to spell out in the Bill the minimum rank(s) of the public officers, well-established mechanisms are in place to ensure the authorization of officers at the appropriate rank(s) to perform the necessary functions.

Power of authorized officers

19. Regarding the term "necessary force" in clause 15(3)(b), members of and the Legal Adviser to the Bills Committee have suggested the Administration to consider stating expressly in the Bill that authorized officers would only use "reasonably necessary force" for the purpose of this provision, in order to achieve consistency in the use of expression with a similar reference in clause 19(3) (i.e. "use any force that is reasonably necessary"). In the light of the suggestions, the Administration has agreed to propose amendment to the Bill to make it clear that the "necessary force" is "reasonable".

20. Members of and the Legal Adviser to the Bills Committee have sought clarification from the Administration on (a) the meaning of "used wholly or principally for dwelling purposes" in clauses 13(2) and 14(3), (b) whether a vessel used both for the purposes of dwelling and fishing would satisfy the criterion of "used wholly or principally for dwelling purposes" and (c) whether the power under clause 18(1) to stop and board a transport and to require identity proof without warrant may be exercised in relation to a transport (including a

vessel) which is used for dwelling purposes. According to the Administration, the dictionary meaning of the word "wholly" is, amongst others, "as a whole, in its entirety, in full"; "exclusively, solely, only" while "principally" means, amongst others, "for the most part, in most cases". Whilst there is no direct case law on the expression of "used wholly or principally for dwelling purposes" in relation to a vessel, it is believed that, for a vessel used both for the purposes of dwelling and fishing, the application of clause 13(2) or 14(3) should be considered on the facts of actual usage of such vessel for determining whether it is used mainly for dwelling purpose under the Ordinance, if enacted. Unlike the provision in clauses 13 and 14 which involve inspection and search, clause 18(1) only seeks to require a person to produce his/her proof of identity upon the request of an authorized officer. The authorized officer may still ask a person to produce his/her proof of identity without entering the part of the transport used wholly or principally for dwelling purpose.

The proceeds from sale

21. In relation to a thing to be sold under clause 20 or 23 and the proceeds from the sale and to be paid into the general revenue or a Commission Fund, members have suggested the Administration to draw a clear line in respect of the amount of proceeds of sale for determining the whereto of the net proceeds (i.e. when the proceeds would be transferred to the general revenue or the Commission Fund). The Administration has explained that in deciding whether the proceeds from sale of a thing under clause 20 or 23 should be transferred to the Commission Fund or the general revenue, DAFC will take into account various factors such as the total amount of the proceeds, the associated administrative cost and the nature of the offence (if any). Generally speaking, if the proceeds are in connection with offences relating to IUU fishing in the Convention Area, such proceeds will be transferred to the Commission Fund unless the associated administrative cost is relatively too high to justify the transfer. The Administration will make reference to the practices of other CPs and draw up internal guidelines on the handling of the proceeds.

Advance notice to the owner of thing seized

22. Clause 22(1) seeks to provide that if a thing is seized under clause 16 but no prosecution is brought in respect of the thing, an authorized officer may apply to the court or magistrate for an order in respect of the thing or any proceeds from the sale of the thing. The Legal Adviser to the Bills Committee has sought clarification from the Administration as to whether the officer would need to give an advance notice and/or an opportunity to be heard to the owner of the thing seized before applying to the court for an order under clause 22(1).

23. The Administration has explained that there may be cases where the thing seized is an abandoned item and the owner of it is unknown or cannot be found. Issuance of an advance notice to the owner may therefore not be practical for each and every case. As a matter of natural justice, an opportunity to be heard will be given to the owner of the thing seized before an application is made to the court for an order under clause 22(1).

DAFC's power to exchange information

24. Clause 26 seeks to provide that, for implementing any provision in CCAMLR and its CMs, DAFC may exchange any information, as reasonably required, with the Secretariat of the Commission or the competent authority of any place. Regarding the proposed power for DAFC under this clause, Mr Steven HO and Mr Kenneth LEUNG have enquired about the relevant requirements relating to information exchange under CCAMLR; the scope of information that may be exchanged, as "reasonably required" by the Secretariat of the Commission or competent authorities of other places; and whether personal data of individuals will, and if so, under what circumstances will those data, be disclosed in the information exchange process. In their view, there should be relevant safeguards relating to such exchange of information.

25. Concern has also been raised on how DAFC will ensure that, when exchanging information with the Secretariat of the Commission or competent authorities of other places, the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") will be complied with. Mr Kenneth LEUNG has suggested the Administration to consider seeking the relevant exemption(s) under PDPO for the purpose of exchanging information with the Secretariat of the Commission or competent authorities of other places pursuant to clause 26.

26. According to the Administration, the requirements relating to information exchange are set out in three CMs under CCAMLR: CM10-03 "Port inspections of fishing vessels carrying Antarctic marine living resources" states that CPs shall provide the Secretariat of the Commission with a report on the outcome of each port inspection conducted; CM10-05 "Catch Documentation Scheme for *Dissostichus* spp." requires that all catch, export or re-export documents and other data required under the Catch Documentation Scheme shall be made available to the Secretariat of the Commission and members who have a role in the completion of such documents; and CM10-08 "Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures" requires the exchange of information regarding vessel identification, ownership including beneficial ownership, crew and catch, as well as information regarding relevant domestic legislation and the results of actions taken with regard to the implementation of CM10-08. Information exchanged for such purposes will include, among others, those set out in CCAMLR's prescribed forms, such as

names and contact details of vessels owners, vessel operators and importers/exporters of toothfish. Provision of such information may cover personal data of individuals that are relevant to the implementation of CCAMLIR only.

27. The Administration has advised that it has consulted the Office of the Privacy Commissioner for Personal Data ("PCPD") on DAFC's power to exchange information for the implementation of CCAMLIR. PCPD's advice is that any use of personal data is subject to the requirements under Data Protection Principle ("DPP") 3 of PDPO. According to DPP 3, personal data shall not, without the prescribed consent of the data subject, be used for a new purpose. DAFC would therefore be required to ensure that the purpose of transfer of information is the same as, or directly related to, the original purpose of data collection. The Administration has assured members of the Bills Committee that when exchanging information with the Secretariat of the Commission or competent authorities of other places, DAFC will ensure compliance with DPPs and the provisions of PDPO by, inter alia, clearly setting out the data collection purpose and usage in the documents from which personal data are collected. If the exchange of information pursuant to clause 26 of the Bill would amount to a new purpose for which the prescribed consent of the data subject has not been obtained, DAFC will consider whether section 60B(a) of PDPO (which stipulates that personal data is exempt from the provisions of DPP 3 if the use of the data is required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong) may be relied on, depending on the facts and circumstances of individual cases.

Liability of employers and principals

28. Clause 31 seeks to provide for the liability of employers and principals in relation to acts done or omission made by employees and agents. With respect to the proposed defence under clause 31(4), members of and the Legal Adviser to the Bills Committee have sought clarification on the relevant burden and standard of proof, in particular whether the burden on the defendant would only be an "evidential burden" (i.e. sufficient evidence is adduced to raise an issue). Similarly, as clause 32 seeks to provide for the defence of an employee charged with an offence under the Bill for an act done or omission made by himself/herself, members have requested the Administration to clarify the applicable burden and standard of proof required under clause 32.

29. The Administration has explained that the policy intent is that the defendant is only required to discharge an evidential burden to establish the proposed defence in clauses 31(4) and 32. As such, the defendant has to provide sufficient evidence to raise a potentially exculpatory issue and the legal burden would remain on the prosecution to disprove the alleged exculpatory matter and to prove the case beyond reasonable doubt. Taking into account members' views,

the Administration will propose amendments to clauses 31(4) and 32 to make the above policy intent clearer.

Amendments to the Bill

30. The proposed amendments to be moved by the Administration to the Bill as mentioned in paragraphs 19 and 29 above are in **Appendix III**. The Bills Committee does not object to these proposed amendments.

31. The Bills Committee will not propose any amendments to the Bill.

Follow up actions required of the Administration

32. The Administration has been requested to provide, at the time when the regulations to be made under clause 4 are tabled in LegCo, the subcommittee studying the relevant regulations, if formed, with the framework concerning extra-territorial operations under clause 4(2) and explain in detail how the regulations will apply to "Hong Kong persons", "Hong Kong companies" and "other persons acting in Hong Kong" (paragraph 12 refers).

Resumption of Second Reading debate

33. The Bills Committee supports the resumption of the Second Reading debate on the Bill, subject to the Administration moving the proposed amendments to the Bill. The Administration has informed the Bills Committee of its intention to resume the Second Reading debate on the Bill at the Council meeting of 23 January 2019.

Advice sought

34. Members are invited to note the deliberations of the Bills Committee.

**Bills Committee on
Conservation of Antarctic Marine Living Resources Bill**

Membership list

Chairman	Hon Steven HO Chun-yin, BBS
Members	Hon Kenneth LEUNG Dr Hon Elizabeth QUAT, BBS, JP Hon SHIU Ka-fai Hon HUI Chi-fung (Total : 5 members)
Clerk	Miss Josephine SO
Legal Adviser	Mr Cliff IP
Date	16 July 2018

**Conservation Measures (“CMs”) Relevant to
the Hong Kong Special Administrative Region**

- (a) **CM 10-03** - “Port inspections of fishing vessels carrying Antarctic marine living resources”, which sets out requirements in respect of the entry and inspections of fishing vessels carrying toothfish or other Antarctic marine living resources;
- (b) **CM 10-04** - “Automated satellite-linked Vessel Monitoring Systems (“VMS”)”, which sets out requirements in respect of the installation of satellite-linked vessel monitoring devices and monitoring of the movements of such vessels, and the use of VMS data in compliance and inspection purposes;
- (c) **CM 10-05** - “Catch Documentation Scheme for *Dissostichus* spp.”, which provides for a basis for identifying the origins of toothfish imports and determining if the toothfish were caught in accordance with the requirements of relevant CMs;
- (d) **CM 10-06** - “Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures”, which aims to draw up a monitoring list to keep track of vessels of Contracting Parties (“CPs”) that have engaged in IUU fishing activities;
- (e) **CM 10-07** - “Scheme to promote compliance by non-Contracting Party¹ vessels with CCAMLR conservation measures”, which aims to draw up a monitoring list to keep track of vessels of Non-Contracting Parties that have engaged in IUU fishing activities; and
- (f) **CM 10-08** - “Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures”, which requires CPs to take measures to verify if any of its nationals has engaged in IUU fishing activities and measures to prevent such illegal activities.

¹ Non-Contracting Parties (“NCP”) means a state not formally associated with the CCAMLR. Some states have chosen to be a cooperating NCP to voluntarily implement the CDS.

Conservation of Antarctic Marine Living Resources Bill

Committee Stage

Amendments to be moved by the Secretary for Food and Health

<u>Clause</u>	<u>Amendment Proposed</u>
15(3)(b)	By adding “reasonably” after “use”.
31	By adding— <ul style="list-style-type: none"> “(5) A person is taken to have established a fact that needs to be established for a defence under subsection (4) if— <ul style="list-style-type: none"> (a) there is sufficient evidence to raise an issue with respect to the fact; and (b) the contrary is not proved by the prosecution beyond reasonable doubt.”.
32	By renumbering the clause as clause 32(1).
32	By adding— <ul style="list-style-type: none"> “(2) An employee is taken to have established a fact that needs to be established for a defence under subsection (1) if— <ul style="list-style-type: none"> (a) there is sufficient evidence to raise an issue with respect to the fact; and (b) the contrary is not proved by the prosecution beyond reasonable doubt.”.