

offence, the dirtying or the nuisance results from direct throwing or discharging, but also when such effect occurs indirectly, *e g* due to the place where the waste was disposed of, as in the case of contamination of underground aquifers " *Id* at 12 The Professor fails to cite any evidence indicating that contamination of the water supply occurred here Besides a lack of legal and factual support, his argument fails in light of the conclusion in the PAR report [FN12] that "the water quality is acceptable" and on account of the September 8, 1993 statement by the Province in its official chronology that the analyses done on September 7, 1992 by the Local Health Units show no contamination of the water inside the Orzinuovi plant See Pls ' Ex W, Tosato Rpt , p 9

**FN12** The "PAR report" refers to the report prepared by PAR Srl, the consulting firm hired by Rutgers to conduct environmental inspections at the Orzinuovi plant See Defs ' Ex 52, p 3

Based on the record in this case, the Court concludes that Frendo was not in violation of article 674 of the Italian Penal Code during the relevant time periods [FN13]

**FN13** The maximum punishment for violation of article 674 is one month imprisonment or a \$235 fine See Pls ' Ex W, Tosato Rpt , p 10 The Court therefore makes the same observation with respect to article 674 as it did with respect to article 216 of the CHA, namely, that any violation of either article would not have had a material and adverse affect on Frendo's business (finances or operations), and thus, under the terms of the 1989 Purchase Agreement, no breach of warranty would have resulted

## 2 Articles 440 and 452

Professor Amendola also concludes that the presence of landfills at the Orzinuovi plant violated articles 440 and 452 of the Penal Code as a result of the contamination of the aquifers Article 440, read in conjunction with article 452, relates to the negligent "adulteration or counterfeiting of edibles" and "punishes whomever corrupts water or food designated for consumption in a way that is dangerous for public health " Pls ' Ex W, Tosato Rpt , p 11, *see also* Coccia Decl , Tabs 17, 18 (English translations of articles 440

and 452) For these provisions to apply here, Plaintiffs must prove that because of the Orzinuovi landfills an adulteration of water designated for drinking occurred to such a degree as to be dangerous for public health See Pls ' Ex W, Tosato Rpt , p 11 Professor Amendola, however, fails to provide any factual basis to support his conclusion As discussed in connection with Plaintiffs' article 674 claim, the record reflects that no contamination of drinking water was shown to have occurred as a result of the landfills See Roberts Aff ¶ 3, Ex B, p 152 Trying to dodge this deficiency, Professor Amendola cites a Court of Cassation decision (Criminal Division, Decision no 968, Oct 24, 1991) for the proposition that adulteration of water, pursuant to articles 440 and 452, occurs based on the mere danger of adulteration, even if no actual damage occurs See Pls ' Ex U, Amendola Rpt , p 12 Professor Amendola has misconstrued that decision, as it held that with respect to the crime of adulteration of water, the government need not prove actual damages, provided that there is adequate evidence to establish an actual adulteration of drinkable water and a danger to public health See Pls ' Ex W, Tosato Rpt , p 11

\*19 Accordingly, based on the record in this case, the Court concludes that Frendo did not violate article 440 or 452 of the Penal Code

## 3 Article 635

In his report, Professor Amendola further concludes that the presence of landfills at the Orzinuovi plant violated article 635 of the Penal Code (which makes it a crime to seriously damage property) due to contamination of the aquifers Professor Amendola points out that in construing this article, a Court of Cassation decision advised that "the pollution of deep aquifers constituting public water resources available to anyone through the use of wells constitutes the crime of serious damaging of property in view of the public designation of the water " See Pls ' Ex U, Amendola Rpt , p 13 From this quotation, it seems clear that for article 635 to apply in the public water-supply context, proof of pollution must exist Because article 635 requires proof of contamination of water (*i e* , "deep aquifers"), which is not present in this case, the Court concludes that Frendo did not violate article 635 of the Penal Code based on the evidence in this case

## d Lombardy Regional Law

In 1980, the Lombardy Region enacted Regional Law no 94 of June 7, 1980 (the "LRL") to provide a regulatory scheme for waste disposal within the Region See Pls ' Ex U, Amendola Rpt , p 13, Pls ' Ex W, Tosato Rpt , p 12 Professor Amendola alleges that