4.3. Protection by making “high protective standards” a goal?

The drafts of the agreements further attempt to safeguard standards by stipulating a “high level of protection”.41 By setting such goals, calling to mind the EU legislation concerning legal harmonization within the European market, the intention is to ensure that regulatory cooperation does not lead to a lowering in the level of existing standards. But here too, the extent to which the provisions specifically stipulated in the drafts of the agreements can contribute to securing European standards is open to question because there is no detailed explanation as to what constitutes a “high standard”. The specific wording also raises doubt. For example, according to the CETA chapter on regulations, high protective standards are to be pursued only “in conformity with” WTO regulations, which for their part do not aim for a high level of protection. The CETA chapter on environmental protection states only vaguely that the contracting parties must “seek to ensure that those [environmental protection] laws and policies provide for and encourage high levels of environmental protection”42. This language is probably much too weak to steer regulatory cooperation in any substantial way.

4.4. Justification of regulations through the precautionary principle?

Numerous European regulations are based on the precautionary principle.43 The precautionary principle states that in the presence of certain indications, measures for the protection of persons and the environment can be undertaken, even if a danger has not yet been established with final scientific certainty. The precautionary principle also plays an important role at the international level. In respect to environmental protection, the precautionary principle finds expression in Principle 15 of the legally nonbinding closing declaration of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro that states: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Similar binding statements are contained in the Framework Convention on Climate Change and the Convention on Biological Diversity. Cases of the application of the European precautionary principle may be found in bans and regulations regarding the use of hormones in meat, and regarding genetically modified organisms such as crops like corn.

The science-based approach dominates in the law of the WTO, particularly in the Agreement on the Application of Sanitary and Phytosanitary Measures (WTO SPS Treaty). This generally allows the application of trade-restricting regulations to defend against dangers only if scientific evidence has been established. Here, in cases of insufficient scientific evidence, the often legally relevant WTO SPS Treaty allows for provisional measures only, without mentioning the precautionary principle as a term. Moreover, these measures are subject to an obligation of rapid clarification and must be reviewed within a reasonable time in the light of

41 See Chapter 24 Art. 2, Chapter 25 Art. X.4, and Chapter 26 Art. X.2 Para. 2 of the CETA draft, as well as Art. 1 Para. 1a of the TTIP draft.
42 Chapter 25 Art. X.4 of the CETA draft.