

## THE MUTUAL LEGAL ASSISTANCE PROCESS IN EL SALVADOR

In the Republic of El Salvador, mutual legal assistance is understood as the cooperation that one State accords another in response to a request for assistance. That cooperation may range from a simple request for information on a specific case to more complex undertakings such as expert testimony or taking statements from witnesses. The procedure for mutual legal assistance involves the sending of a request, petition or rogatory commission from the requesting State to the requested State, as a State may be either the requesting or the requested State, depending on the case.

When El Salvador is the requesting State and uses diplomatic channels to have the request, petition or rogatory commission acted upon in the foreign State, the competent judge refers to the Supreme Court of Justice the need to conduct a given procedural act abroad. If the request is lawful, it will be fulfilled by the Superior Court, sending the files to the Ministry of External Relations through the Ministry of Public Safety and Justice, and the latter will remit this to the competent authority in the foreign State where that procedural act must be performed.

**Legal basis.** Article 182 (3) of the Political Constitution, Article 139 of the Code of Penal Procedure, Article 27 of the Code of Civil Procedure, Articles 32 (2) and 44 (C) of the Rules of Procedure of the Executive Branch.

If article 139 of the Code of Penal Procedure is used, the rogatory commission must be translated into the language of the requested State, pursuant to article 392 of the Bustamante Code.

When El Salvador is the requested State and diplomatic channels are used for the transfer, the rogatory commission is introduced by the requesting State to the Ministry of External Relations which, via the Ministry of Public Safety and Justice, transmits it to the Supreme Court of Justice to determine whether it is lawful and to order fulfillment of the procedural act requested. Once this is decided, the Supreme Court of Justice returns the decision to the Ministry of External Relations through the Ministry of Public Safety and Justice, for transmittal by diplomatic channels to the requesting State.

**Legal basis.** Article 182 (3) of the Political Constitution, Article 140 of the Code of Penal Procedure, Article 27 of the Code of Civil Procedure, Articles 32 (2) and 44 (C) of the Rules of Procedure of the Executive Branch.

The mutual legal assistance process uses diplomatic channels as a general rule, unless the applicable treaty determines that it should be conducted between the corresponding central authorities.

An example of this is the Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, in which the Supreme Court of Justice is the Central Authority, whether El Salvador is the requesting or the requested State.

If El Salvador is the requesting State, the competent judge asks the Supreme Court of Justice, as the Central Authority, to perform a procedural act in a State party to that treaty which in this case is the requested State; if it is lawful it will be performed by the Superior Tribunal, transmitting the request, petition or rogatory commission to the central authority of the requested State.

**Legal basis.** Article 182 (3) and 144 of the political Constitution, Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

If El Salvador is the requested State, the request, petition or rogatory commission comes directly to the Supreme Court of Justice as the Central Authority of the Requesting State and Party to the Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. If it is lawful it will be fulfilled by the corresponding authority, and then transmitted via the Supreme Court of Justice as the central authority to the central authority of the requesting State.

**Legal basis.** Article 182 (3) and 144 of the political Constitution, Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

Finally, if there is no treaty or convention, mutual legal assistance is based on international custom and the general principles of law, specifically the principle of reciprocity, international jurisprudence and doctrine.

## LEGAL ASSISTANCE IN CRIMINAL MATTERS IN EL SALVADOR

In El Salvador, legal assistance in criminal matters has its basis in article 182 (3) of the Constitution, which establishes the powers of the Supreme Court of Justice in the area of judicial cooperation, as follows: "to consider grounds for seizure and other matters not reserved to another authority; to order the issuance of petitions or rogatory commissions for acts to be performed outside the State and to order compliance with those received from other states, in observance of the provisions of treaties; and to grant extradition."

As a direct consequence of the foregoing provision, articles 139 and 140 of the Code of Penal Procedure provide that "with respect to foreign courts, the rogatory commission shall be used. The interested judge or tribunal shall send the commission to the Ministry of External Relations, through the Supreme Court of Justice, for transmittal by diplomatic channels", and "the rogatory commission

from a foreign court shall be processed in the cases and manner established by treaties or international custom and by the laws of the country, and the response shall be sent via the Ministry of External Relations."

There is currently no national legislation governing rogatory commissions, beyond the provisions cited above, which means that such matters will be handled in direct application of valid international treaties to which El Salvador is party, or international custom and the direct application of domestic law.

Generally speaking, treaties in this matter contain provisions relating to the scope of assistance, the designation of central authorities, the limits, manner and content of the request, provisions on handling the request, expenses and other aspects; thus, the request for assistance will be handled in conformity with general procedural law.

## **PROCESSES AND PROCEDURES**

### **El Salvador as requested State**

#### **A) Official requests under treaties**

Once the rogatory commission has been received, either by the Ministry of External Relations or by the Central Authority, this is transmitted to the Supreme Court of Justice: in the first case, through the Ministry of Public Safety and Justice, as this is the means of communication between the executive branch and the judiciary,<sup>1</sup> and in the second case, directly.

The Supreme Court of Justice will examine the documentation submitted and determine whether it fulfills the requirements of the Treaty and domestic law.

If the request is in order, the full court will prepare a resolution ordering compliance and identifying the authority that must carry it out. If on the contrary it is found that the requesting State has not fulfilled the requirements of the treaties, or that additional information is needed, a resolution will be prepared returning the rogatory commission and indicating its deficiencies or the information required, so that the submitting authority may complete it.

If the Supreme Court of Justice deems the request unacceptable for other than merely procedural reasons, and if these are stipulated in the Treaty, it will prepare a grounded resolution, to be signed by the full court, denying the request for assistance presented by the requesting State.

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<sup>1</sup> Decree 11 was published in the Official Gazette Number 27, Volume 374 of February 9, 2009, reforming the Rules of Procedure of the Executive Branch with respect to the powers of the Ministry of Public Safety and Justice as the means of communication between the Executive Branch, the Supreme Court of Justice, the Public Ministry, the Coordinating Commission for the Justice Sector, and the National Judiciary Council.

If the request is accepted, and once the procedure ordered by the Supreme Court is completed by the national authority previously designated in light of the nature of the request for cooperation, the authority will report back on its action to the Supreme Court of Justice for review. If it is found that the procedure ordered has not been duly fulfilled, the matter will be returned to the national authority for full compliance. If the procedure is found to have been duly fulfilled, the court will issue a resolution ordering the return of the request for cooperation to the requesting State.

When the requested State returns any request for legal assistance to the requesting State, either because it has been duly processed or because there is some omission or further information is required, or because the request has been denied, any of the following channels may be used:

1. When handled by the central authority pursuant to a treaty, there are two options. If the Court is the central authority, it remits the fulfilled request for assistance directly to the central authority of the requesting State; if the Supreme Court of Justice is not the central authority, the processed request is sent to the central authority of El Salvador, which will remit it to the central authority of the requesting State.

2. If the Treaty stipulates diplomatic channels, the fulfilled request will be remitted to the Ministry of Public Safety and Justice of El Salvador, which will send it to the Ministry of External Relations, for transmittal either to the Salvadoran Embassy in the requesting State or to the Embassy of the requested State in El Salvador.

## **B) Official requests in the absence of the Treaty**

As noted above, article 182 (3) of the Constitution determines the powers of the Supreme Court of Justice in this area, which include the power “to order the issuance of petitions or rogatory commissions for acts to be performed outside the State and to order compliance with those received from other states, in observance of the provisions of treaties”

As a direct consequence of the foregoing provision, article 140 of the Code of Penal Procedure provides that "the rogatory commission from a foreign court shall be processed in the cases and manner established by treaties or international custom and by the laws of the country, and the response shall be sent via the Ministry of External Relations."

Consequently, in cases where there is no valid treaty, the Supreme Court of Justice must resort to international custom and domestic law in determining whether a request is acceptable or not.

If the request is acceptable, the Supreme Court of Justice prepares a resolution of the full court, ordering that the request be fulfilled and determining national authority that must do this. In the contrary case, i.e. if it is found that the requesting State has not fulfilled the minimum requirements stipulated by international custom or by Salvadoran law, a resolution will be prepared for signature by the full court, returning the rogatory commission and indicating its deficiencies or any further information required, so that the submitting authority may complete it.

If the Supreme Court of Justice deems the request unacceptable for other than merely procedural reasons, it will prepare a grounded resolution, to be signed by the full court, denying the request for assistance presented by the requesting State.

Once the procedure ordered by the Supreme Court is completed by the national authority previously designated in light of the nature of the request for cooperation, the authority will report back on its action to the Supreme Court of Justice for review. If it is found that the procedure ordered has not been duly fulfilled, the matter will be returned to the national authority for full compliance. If the procedure is found to have been duly fulfilled, the court will issue a resolution ordering the return of the request for cooperation to the requesting State.

The request will then be returned to the requesting State by diplomatic channels, i.e. it will be remitted to the Ministry of Public Safety and Justice of El Salvador, which will send it to the Ministry of External Relations, for transmittal either to the Salvadoran Embassy in the requesting State or to the Embassy of the requested State in El Salvador.