

# Brazil - strategic opportunities for company expansion in Latin America through M&A and market investment

**Stephen O'Sullivan**

Outubro 2024

**MATTOS FILHO**

**SPEAKER**

## Biography



Tel: + 55 11 3147 7886

E-mail:

stephen.osullivan@mattosfilho.com.br

**Stephen O'Sullivan** is a corporate transactional attorney whose practice focuses on cross-border mergers and acquisitions, in-bound investment, and other cooperative ventures involving international and Brazilian companies.

A native English speaker who has lived in Brazil for over 30 years, he has particular expertise in guiding multinational business groups through the regulatory and transactional hurdles that arise when investing and operating in Brazil.

Mr. O'Sullivan is licensed to practice law in Brazil, England and Wales and New Zealand.

Also fluent in Portuguese, Spanish and French.

# **ECONOMIC ENVIRONMENT**

# Overview

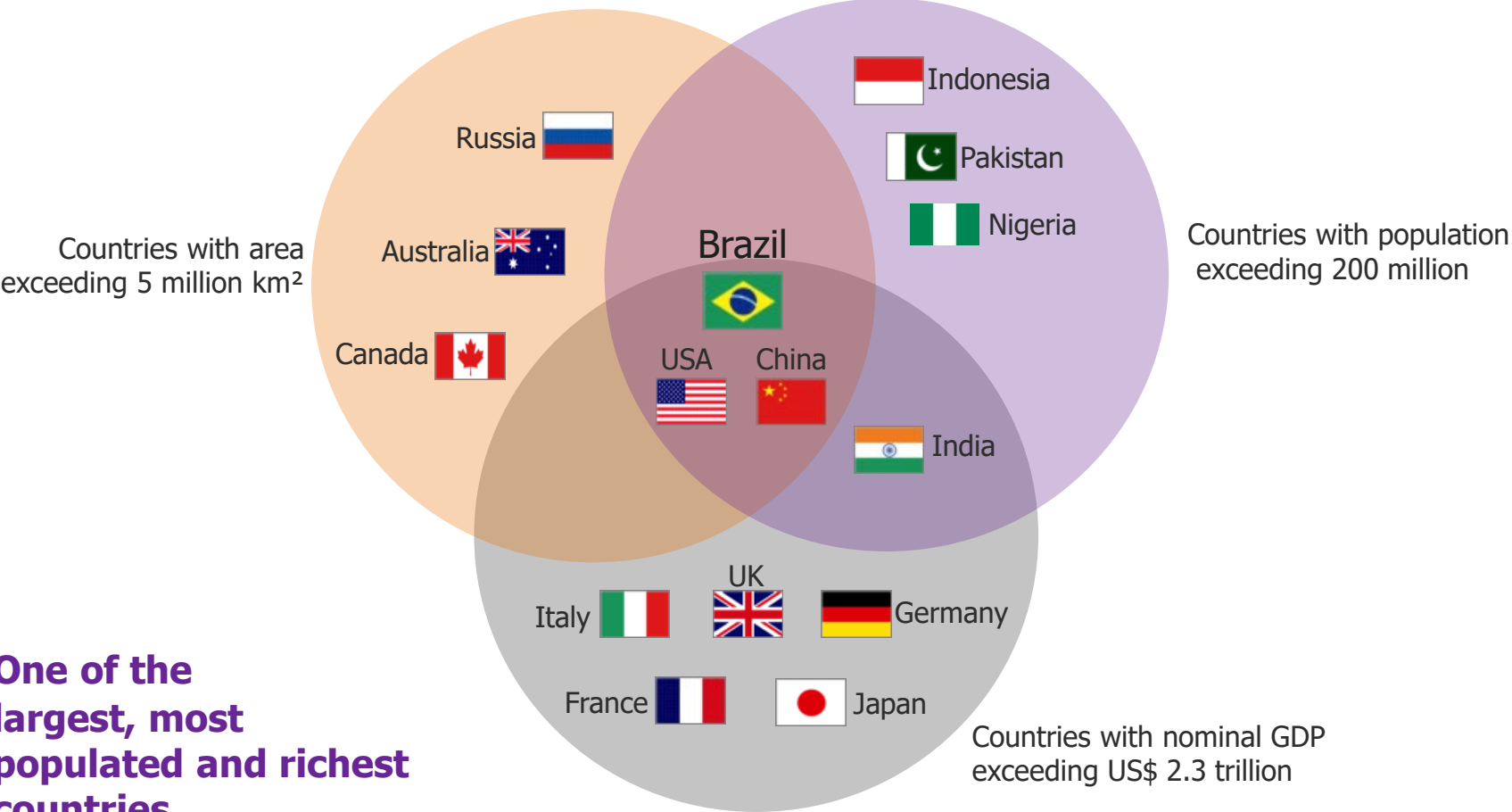
- Brazil is a federal republic: comprising 26 states and the Federal District, where the city of Brasilia, the country's capital, is located.



# Overview

- World's 8th largest economy (2024 - IMF)
- World's 5<sup>th</sup> largest country by area
- World's 7<sup>th</sup> largest country by population
- Population: 212.6 million (est. Jul 2024 - IBGE)
  - Largest Cities: São Paulo, Rio de Janeiro, Brasília, Fortaleza, Salvador, Belo Horizonte, Manaus, Curitiba, Recife, Goiânia, Porto Alegre, Belém, Guarulhos, Campinas, São Luís, Maceió (all with populations over 1 million)
- 6.8% unemployment rate (Jul 2024)
- 4.42% annual inflation rate (Sep 2024)
- Basic interest rate (SELIC): 10.75% p.a. (Sep 2024)

# Overview



**One of the largest, most populated and richest countries**

• Source: International Monetary Fund (IMF)

# LEGAL ENVIRONMENT



# Overview

- Brazil's Constitution establishes a "presidential form" of government with three independent branches: executive, legislative and judiciary.
- Judiciary: composed of federal and state courts. The Federal Supreme Court is the court of final recourse.
- Each state has its own state trial courts and appellate court, with jurisdiction over matters involving persons or entities not related to federal government, including states and cities.
- Matters involving federal government entities or federal government companies are subject to the special jurisdiction of federal trial courts and federal appellate courts.
- There are also special courts to deal with labor/employment matters, as well as specialized electoral and military courts.

# Overview

- Legal System: based on codified (Roman) law. Brazilian Supreme Court may identify certain of its decisions which must be followed by lower courts, but most appellate decisions are not binding precedents and lower courts are not obliged to follow them.
- Arbitration is increasingly common in Brazil.
- Civil Code: main source of law.
- Foreign judgments: Brazil recognizes foreign judgments and foreign arbitral awards.

# Foreign Investment – Corporate Aspects

- **Representation of Foreign Investors in Brazilian Companies**

In the event of the acquisition by a foreign individual or foreign entity of an equity interest in a Brazilian company – whether a *sociedade anonima* (“S.A.”) which issues shares or a *limitada* (“Ltda.”) which issues “quotas” – the investor must appoint a representative in Brazil, by granting a power of attorney to an individual resident in Brazil who will also act as agent for service of process. The power-of-attorney will also contain powers that enable the representative to vote and execute corporate documents on behalf of the foreign investor. The power-of-attorney must be notarized and apostilled (or consularized at a Brazilian consulate) in the foreigner’s home country, translated into Portuguese by a sworn translator and registered with a public Registry Office (*Cartório*).

- **Appointment of a Foreign Individual to Manage Brazilian Companies**

This is now permitted. However, if a foreign individual is appointed as an officer of a Ltda. or officer or Board member of an S.A., this individual must also appoint a representative in Brazil.

# Entering the Brazilian Market

- Foreigners may do business in Brazil either through a local Brazilian company with foreign capital (i.e. a Brazilian subsidiary) or through a local branch (subject to formal government prior approval). Branches are not recommended because of potential delays as a result of this bureaucratic process.
- Forms of investment:
  - direct investment in a Brazilian company:
    - organizing a new entity;
    - acquiring an existing entity;
    - corporate joint venture.
  - indirect investment through capital and financial markets without the need to create formal Brazilian entity;
  - contractual joint venture.
- Establishing a new entity vs. acquiring an existing entity:
  - Timeframe;
  - Liabilities.

# Establishing a New Entity – Main Corporate Forms

- Limited liability companies (“Ltda.”) and corporations (“S.A.”) are the main types of corporate entities in Brazil. Under applicable laws, their shareholders have limited liability in relation to the company’s debts and obligations. Piercing of the corporate veil is possible in the case of fraud and requires a court ruling. Shareholder liability risk is higher in labor/employment, tax and environmental matters.
- The Ltda. is the corporate form most commonly used in Brazil by foreign investors, due to its simplicity and lower operating costs.
- The main advantages of incorporating an S.A. are: (i) corporate control is achieved with 50% + 1 of the voting shares (while up to 75% may be required for a Ltda.); (ii) the S.A. can obtain funding through a public offering of shares and other securities; (iii) in a privately-held S.A., transfers of shares are not required to be registered through an amendment to the company’s articles of association, and therefore are not publicly disclosed; (iv) it is possible to have non-voting preferred shares representing up to 50% of the capital stock, which is not permissible with a Ltda.; and (v) an S.A. may have a Board of Directors (*Conselho de Administração*).

# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b><u>Shareholders:</u></b> As a general rule, the S.A. must have at least two shareholders who must subscribe to all of the shares of the company's capital stock. They may be individuals or corporate entities, whether domiciled in Brazil or abroad.</p> <p><b><u>Organization:</u></b> Execution of by-laws (<i>Estatuto Social</i>).</p> <p><b><u>Quorum for Resolutions:</u></b> Most shareholder decisions in an S.A. may be taken by a majority of the shareholders present at the general shareholders' meeting or, in special cases under applicable law, by those holding a majority of the capital stock. Additionally, there are matters which may demand the unanimous vote of the shareholders (such as the conversion of the S.A. into another corporate form, except if otherwise provided in its by-laws).</p>	<p><b><u>Quotaholders:</u></b> A Ltda. is required to have a minimum of only one quotaholder, whether individuals or corporate entities, Brazilian or foreign domiciled.</p> <p><b><u>Organization:</u></b> Execution of the articles of association (<i>Contrato Social</i>).</p> <p><b><u>Quorum for Resolutions:</u></b> The resolutions of the quotaholders altering the articles of association or deciding certain important matters (such as mergers or dissolution, among others) must be taken as specified in the articles or otherwise by a majority of the corporate capital. Additionally, there are matters which may demand the unanimous vote of the quotaholders (such as the conversion of the Ltda. into another corporate form, except if otherwise provided in its articles of association).</p>

# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b>Limited Liability:</b> The shareholders are liable only for their contributions to the capital stock, except for certain circumstances prescribed by law, in which event the company or creditors may hold the company's shareholders or managers liable due to actions taken against the law or without proper corporate authority.</p>	<p><b>Limited Liability:</b> The liability of the quotaholders will vary according to the amount contributed to capital:</p> <ul style="list-style-type: none"> <li>▶ If the quotas have been subscribed to, but not fully paid in, the quotaholders will be jointly liable for the total amount of the unpaid capital; and</li> <li>▶ If the subscribed capital has been entirely paid in, the liability of the quotaholders is limited to their contribution to capital, i.e., their quotas, except for certain circumstances prescribed by law, in which event the company or the company's creditors may hold the company's quotaholders or managers liable.</li> </ul>

# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b>Capital Stock:</b> The capital of an S.A. is divided into shares, each representing a fraction of the capital stock and a bundle of rights attached thereto.</p> <p>As a general requirement, at the time of incorporation of the company, at least 10% of the capital subscription must be deposited in cash. There is no requirement as to the minimum amount of capital stock to be subscribed, either upon the initial subscription for shares or upon subsequent increases to capital stock, except for certain types of companies (such as trading companies). However, a capital increase may only occur if 75% of the existing capital has been paid in.</p> <p>There may be a number of different classes of shares, each class conferring different rights, advantages and/or restrictions on their respective holders.</p>	<p><b>Capital Stock:</b> The corporate capital of a Ltda. is divided into “quotas” that, in much the same way as shares, represent a bundle of rights and assets in the company. The quotaholders must be named (registered) in the articles of association of the company, but are not issued certificates representing their quotas or any form of security.</p> <p>There is no requirement as to the minimum amount of quotas that must be subscribed, either upon initial subscription for quotas or subsequent increases to capital, except for certain types of companies (such as trading companies). However, a capital increase is permissible only if 100% of the existing capital has been paid in.</p>



# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b>Capital Stock:</b> The most common classes of shares are common shares and preferred shares. Preferred shares may be voting or non-voting. Preferred shares may be entitled to either a preference in the distribution of a minimum or fixed dividend, or a liquidation preference in the event of liquidation of the company, or both such rights. No more than 50% of the total capital stock of an S.A. may be issued as preferred shares with restricted voting rights.</p> <p>Shares must be registered in the name of their owners – bearer shares are not permitted under Brazilian law.</p>	<p><b>Capital Stock:</b> Ltda. may issue different types of quotas, but voting rights attach to all quotas.</p>

# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b>Management:</b> The administration and management of an S.A. may be divided into different bodies – the Board of Directors (<i>Conselho de Administração</i>), the Board of Officers (<i>Diretoria</i>) and the Audit Committee (<i>Conselho Fiscal</i>).</p> <p>A Board of Directors is not mandatory, but, in the event a company chooses to have a board, it must be comprised of at least 3 members (all natural persons). Only 1/3 of the members of the Board of Directors may also be elected as officers.</p> <p>The Board of Officers is a mandatory body and must have a minimum of 2 members (natural persons resident in Brazil).</p> <p>An S.A. may have an Audit Committee, but need not maintain such committee on a permanent basis.</p>	<p><b>Management:</b> The Ltda. is managed by one or more executive officers, elected by the quotaholders. Such executive officers may be resident and domiciled in Brazil or abroad.</p> <p>The Ltda. may also have a Board of Directors, but this is not common and we generally recommend that an Advisory Board be created instead.</p> <p>An Audit Committee may be established on a permanent basis if provided for by the Articles of Association.</p>

# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b><u>Issuance of bonds and offering:</u></b> An S.A. can issue bonds and securities (such as debentures, subscription bonuses, warranties).</p> <p><b><u>Financial Statements:</u></b> must be prepared and published annually. Some exceptions may apply depending upon size.</p> <p><b><u>Distribution of Dividends:</u></b> Dividends must be distributed proportionally to the equity interest of each shareholder, as well as respecting the rights of preferred shares, if applicable.</p>	<p><b><u>Issuance of bonds and offering:</u></b> Ltdas. are not permitted to issue bonds and securities such as debentures and ADRs, nor make offerings in the capital markets.</p> <p><b><u>Financial Statements:</u></b> In general, financial statements are not required to be published. In any event, this type of entity has fewer publication requirements than the S.A.</p> <p><b><u>Distribution of Dividends:</u></b> Dividends may be distributed disproportionately among quotaholders, subject to certain restrictions.</p>

# Establishing a New Entity – Main Corporate Forms

S.A.	Ltda.
<p><b><u>Share Transfer Restrictions or Rules:</u></b> The shareholders are free to create such rules (right of first refusal is not presumed by law) and the appropriate instrument for this is the shareholders' agreement, which, for purposes of right of first refusal, tag-along, drag-along, put and call options, and exercise of voting power, guarantees specific performance in addition to indemnity rights.</p>	<p><b><u>Quota Transfer Restrictions or Rules:</u></b> Right of first refusal is provided by law and a new quotaholder is only admitted if quotaholders representing at least 25% of the corporate capital agree (the articles of association may provide for a higher quorum). The quotaholders may execute a quotaholders' agreement for purposes of establishing specific rules and procedures for rights of first refusal, tag-along, drag-along, put and call options, exercise of voting power, and specific performance, in addition to indemnity rights.</p>

# Establishing a New Entity – Summary of Practical Steps

- **Minimum steps required for establishing a Brazilian company**
  - Define main terms of by-laws (or articles of association): name of company, names of quotaholders / shareholders, corporate purpose, initial capital, address (physical office address), local manager(s);
  - Appoint representative resident in Brazil to represent foreign quotaholder / shareholder, notarize and apostille power of attorney, obtain sworn translation into Portuguese and register power of attorney with local Brazilian Registry;
  - Engage local service provide services, such as, representative of foreign quotajolder/shareholder, address and officer of the company, to the extent the foreigner investor does not have its own address, representative or officer;
  - File organizational documents with local companies' registry (*Junta Comercial*) and obtain tax ID number (CNPJ);
  - Open bank account, remit funds for capital contribution and register with Central Bank;
  - Engage local accountant to obtain initial local tax registrations, permits/licenses and provide accounting services.

# Government Incentives

- Brazilian states and municipalities may grant incentives in order to attract new investments.
- The main forms of incentives granted by states and municipalities are:
  - Deferred payment of state VAT tax (“ICMS”);
  - Total/partial financing of the ICMS due;
  - Presumed ICMS credit (may be used to offset ICMS debts);
  - Exemption of municipal taxes and fees;
  - Donation/sale of real estate;
  - Construction of access routes;
  - Providing utilities (water, electricity, sanitation, etc.) to the intended site, if such services are not yet available in the area.
- Risk of having these incentives challenged and/or nullified (Brazilian “tax war”).

# Acquiring a Company – Main Aspects

- Competitive process vs. one-on-one negotiation;
- Acquisition of assets vs. acquisition of equity:
  - Succession of rights and obligations towards third parties:
    - Rules regarding acquisition of going concern ("*trespasse*");
    - Continuity of labor/employment agreements;
    - In general, "the liabilities follow the assets".
  - Allocation of risks among parties:
    - Limits on indemnification (cap, basket, time limitation);
    - Right to set-off (contingent payments, deferred installments, escrow amounts).
  - Possible previous corporate restructure:
    - Spin off of non-operational assets;
    - Segregation of other activities carried on by the target;
    - Simplification of multi-entity structures.
- Due diligence:
  - Legal;
  - Compliance and Regulatory;
  - Financial;
  - Accounting;
  - Labor & Employment practices;
  - Tax practices;
  - Environmental practices.

# Acquiring a Company – Structuring

- Different corporate methods for acquiring equity in a Brazilian company:
  - Sales and purchase of shares/quotas:
    - Payment in cash / equity.
  - Merger / “Reverse Merger”:
    - Generally, target’s shareholders become acquiring company’s shareholders;
    - Tax benefits to be considered.
  - “Merger of Shares”:
    - Target becomes acquiring company’s wholly-owned subsidiary;
    - Generally, target’s shareholders become acquiring company’s shareholders.
- Acquiring a publicly-held company:
  - Public information available;
  - Mandatory tender offer may be applicable.



# Acquiring a Company – Antitrust Merger Control

- Transactions that are subject to mandatory filing in Brazil cannot be closed and/or implemented before obtaining clearance from Brazil's antitrust authority, "CADE".
- Filing with CADE is mandatory if the following criteria are met:
  - The transaction has effects in Brazil;
  - The transaction amounts to a "concentration" under Brazilian law; and
  - (a) At least one of the groups involved has gross revenues in Brazil of R\$750 million (approx. US\$135 million) or more in the fiscal year immediately prior to the transaction; and (b) at least one of the other groups involved has gross revenues in Brazil of R\$75 million (approx. US\$13.5 million) or more in the fiscal year immediately prior to the transaction.

# Acquiring a Company – Antitrust Merger Control

- The parties are required to pay the filing fee in the amount of R\$85,000 (roughly US\$15,000).
- Formally, the total review process can take up to 240 days, extendable for an additional period of 60 or 90 days. CADE has been quite responsive so far and transactions filed under the short form have all been cleared in up to 30 calendar days. More complex cases will generally take longer.
- Until antitrust clearance is obtained, the parties must remain completely independent from each other. Failure to comply with such standstill obligation may subject the parties to substantial fines and to an administrative investigation of their behavior prior to obtaining CADE approval.

# Acquiring a Company – Workflow



# Joint Ventures – Corporate JV

- Corporate JV:
  - Incorporation of a special purpose entity:
    - Defining the corporate structure of the JV entity;
    - Setting up corporate governance rules (shareholders' agreement):
      - Preemptive rights;
      - Transfer of shares (tag along, drag along, right of first offer/refusal, put/call options);
      - Voting rights (qualified majority, veto rights);
      - Appointment of directors and officers;
      - Mechanism for resolving deadlocks;
      - Shareholder compensation (minimum dividends, intermediate dividends distribution, "interest on capital");
      - Access to information and other protective covenants;
      - Non-compete, non-solicitation;
      - Dispute settlement mechanism.
  - Consortium.

# Joint Ventures – Contractual JV

- Contractual JV:
  - Use of one of the common types of contracts available in Brazilian law:
    - Franchise;
    - Agency;
    - Commercial representation;
    - Distribution;
    - Others.
  - Use of Brazilian partner's structure and know-how;
  - Allocation of costs and risks;
  - Possibility to use arbitration to resolve disputes;
  - Nature of the activities carried on by the parties in the context of the JV determine the taxation levied on amounts remitted abroad (royalties, compensation for services rendered, commission etc.).

# Disclaimer

- This material is a presentation of general information about Brazil as of the date of this presentation. The information has been summarized and does not purport to be complete. This presentation is for discussion purposes only: it does not and is not intended to constitute legal advice, and its contents do not and are not intended to replace consultation of any applicable legal sources or the necessary advice of a legal expert, where appropriate. No representation or warranty, express or implied, is made concerning, and no reliance should be placed on the accuracy, fairness, or completeness of the information presented. The opinions expressed at or through this presentation are the opinions of the individual speaker and may not reflect the opinions of the firm.

# MATTOS FILHO

 /company/mattosfilho

 /mattos\_filho

 /mattosfilhoadvogados

 /mattosfilho

[mattosfilho.com.br/en](http://mattosfilho.com.br/en)

**único** The Mattos Filho  
news portal

[mattosfilho.com.br/en/unico](http://mattosfilho.com.br/en/unico)



## Thank you!

SÃO PAULO  
CAMPINAS  
RIO DE JANEIRO  
BRASÍLIA  
NEW YORK  
LONDON